# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

## No. 235.

SANTA FE PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

LAURETE HOLMES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 19, 1905.

(19,719.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1905.

Print.

a No. 1084.

United States Circuit Court of Appeals for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Transcript of Record.*

Upon Writ of Error to the United States Circuit Court for the Southern District of California.

1 United States Circuit Court of Appeals, for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Order Extending Time to Docket Cause.*

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is, enlarged and extended to and including the 1st day of June, 1904.

Dated at Los Angeles, California, April 19th, 1904.

OLIN WELLBORN,
*United States District Judge for the Southern District of California.*

[Endorsed:] No. 1084. United States Circuit Court of Appeals for the Ninth Circuit. Sante Fe Pacific Railroad Company (a Corporation), Plaintiff in Error *vs.* Laurete Holmes, Defendant in Error. Order Extending Time to Docket. Filed Apr. 21, 1904. F. D. Monckton, Clerk.

2 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Laurete Holmes, plaintiff, and the Santa Fe Pacific Rail-

road Company (a Corporation), defendant, a manifest error hath happened, to the great damage of the said defendant, the Santa Fe Pacific Railroad Company, a corporation, as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have he same at San Francisco, in the State of California, on the 26th day of April next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid being inspected
the said United States Circuit Court of Appeals may cause
3 further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 28th day of March, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

WM. M. VAN DYKE.
[SEAL.] *Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California.*

The above writ of error is hereby allowed.

OLIN WELLBORN,
*District Judge.*

I hereby certify that a copy of the within writ of error was on the 28th day of March, 1904, lodged in the clerk's office of the said United States Circuit Court, for the Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,
*Clerk U. S. Circuit Court,*
*Southern District of California.*

[Endorsed:] 1027. United States Circuit Court of Appeals for the Ninth Circuit. Santa Fe Pacific Railroad Company (a
4 Corporation), Plaintiff in Error, *vs.* Laurete Holmes, Defendant in Error. Writ of Error. Filed Mar. 28, 1904. Wm. M. Van Dyke, Clerk.

*Citation.*

UNITED STATES OF AMERICA, *ss:*

To Laurete Holmes, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at

of San Francisco, State of California, on the 26th day of
A. D. 1904, pursuant to a writ of error on file in the clerk's
the Circuit Court of the United States, of the Ninth Judicial
in and for the Southern District of California, Southern
, in that certain action number 1027, wherein the Santa
ific Railroad, Company, a corporation, is plaintiff in error,
are defendant in error, to show cause, if any there be, why
gment given, made and rendered against the said, the Santa
fic Railroad Company, a corporation, in the said writ of error
ned, should not be corrected, and speedy justice should not be
that behalf.

ess the Honorable Olin Wellborn, United States District
for the Southern District of California, and one of the Judges
Circuit Court of the United States of America, of the Ninth
Judicial Circuit in and for the Southern District of Cali-
fornia, this 28th day of March, A. D. 1904, and of the Inde-
pendence of the United States, the one hundred and twenty-

OLIN WELLBORN,
*United States District Judge for the Southern District of California.*

dorsed:] No.——. United States Circuit Court of Appeals
Ninth Circuit. Santa Fe Pacific Railroad Company (a Cor-
on). Plaintiff in Error, *vs.* Laurete Holmes, Defendant in
Citation. Rec'd copy of the within this 28th day of March,
Waters & Wylie, Attys. for Plaintiff and Deft. in Error.
Mar. 28, 1904. Wm. M. Van Dyke, Clerk.

nswer of the Judges of the Circuit Court of the United States
America, of the Ninth Judicial Circuit, in and for the Southern
rict of California.

record and all proceedings of the complaint whereof mention
ain made, with all things touching the same, we certify under
al of our said Circuit Court, to the United States Circuit Court
peals for the Ninth Circuit, in a certain schedule to this writ
ed, as within we are commanded.

the Court:

[SEAL.] WM. M. VAN DYKE, *Clerk.*

6 In the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California. At Law.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY, Defendant.

*Complaint.*

Plaintiff for cause of action against the defendant, alleges:

I.

That the plaintiff is now, and at all times mentioned herein, he was, a citizen of the State of Texas.

II.

That the defendant is now, and at all times mentioned herein, it was, a corporation organized and existing under the laws of the United States, having its principal place of business at and being a resident of Los Angeles, in the State of California.

III.

That at all times mentioned in this complaint, defendant was the owner, and in the possession of, and engaged in the oper-
7 ation of, that certain railroad, situated and being in the Territories of New Mexico and Arizona, and in the State of California, its line of railroad extending from Albuquerque, in the Territory of New Mexico to Needles, in the State of California, and said defendant, at all of the times mentioned in this complaint, was operating thereon, its cars, engines, trains and rolling-stock.

IV.

That on the 20th day of November, 1901, plaintiff was in the employ of defendant in the capacity of locomotive engineer, upon said railroad of the defendant, upon the division thereof extending from Needles, California, to Winslow, in the Territory of Arizona, and as such engineer, so in the service of the defendant, was engaged in running engine No. —, attached to and propelling train No. Four, when, at a point upon said railroad near Franconia, without any fault on the part of plaintiff, and solely by reason of negligence and want of care on the part of defendant, the engine upon which plaintiff was so performing his duty as engineer, came in violent collision with an engine and train operated in the opposite direction by the defendant, by reason of which said collision this plaintiff was thrown from the cab of said engine to the ground, and was jammed between oil tank and the ground, by reason of which, plaintiff sustained the following described personal injuries, to wit: A broken and comminuted lower jaw, and the loss of all of his teeth on

both upper and lower Maxillae on the left side back of the canine teeth, and a contused and lacerated wound of left side of his
8 head, and a contused and lacerated wound across his nose and face, and *dislocation* of his right eye, and contusion, laceration, and concussion of the back, and contusion and concussion of the head, brain, spinal column and spinal cord, and other internal injuries.

That, by reason of the injuries so sustained by this plaintiff by and through the negligence of defendant, plaintiff has been damaged in the sum of fifty thousand dollars.

Wherefore, plaintiff asks judgment against defendant for $50,000, and for costs of suit.

BYRON WATERS,
WATERS & WYLE,
*Attorneys for Plaintiff.*

[Endorsed:] No. 1027. In the U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. Complaint. Filed Jul. 1, 1902. Wm. M. Van Dyke, Clerk. Waters & Wylie, 134½ N. Spring St., Tel. M. 1222, Los Angeles, Cal., Attorneys for Plaintiff.

9 UNITED STATES OF AMERICA

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTE FE PACIFIC RAILROAD COMPANY, Defendant.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city of Los Angeles, County of Los Angeles.

*Summons.*

The President of the United States of America, Greeting, to the Santa Fe Pacific Railroad Company:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, and to file your plea, answer of demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles, county of Los Angeles, within twenty days after the service on you
10 of this summons, or judgment by default will be taken against you.

The said action is brought to recover judgment against defendant

for the sum of $50,000, as damages, for that as plaintiff alleges, on the 20th day of November, 1901, while the plaintiff was in the employ of defendant in the capacity of locomotive engineer upon the railroad of defendant, and was engaged in running an engine, at a point upon said railroad near Franconia, without any fault on the part of plaintiff and solely by reason of negligence and want of care on the part of defendant, the engine upon which plaintiff was so performing his duty as engineer came into collision with an engine and train operated in the opposite direction by the defendant, by reason of which said collision this plaintiff was thrown from the cab of said engine to the ground and was jammed between oil tank and the ground, by reason of which, plaintiff sustained the following described personal injuries, to wit: A broken and comminuted lower jaw, and the loss of all of his teeth on both upper and lower Maxillae on left side back of the canine teeth, and a contused and lacerated wound of left side of his head, and a contused and lacerated wound across his nose and face, and *dislocation* of his right eye, and a contusion, laceration and concussion of the back, and contusion and concussion of the head, brain, spinal column and spinal cord, and other internal injuries, by reason of which said injuries defendant alleges he has been damaged in the sum of $50,000; plaintiff also demands judgment for costs of
11 suit; all ofwhich more fully appears from the complaint on file in this cause, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 2d day of July, in the year of our Lord one thousand nine hundred and two, and of our Independence the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
*Southern District of California.*

I hereby certify, that I received the within writ on the 7th day of July, 1902, and personally served the same on the 7th day of July, 1902, by delivering to and leaving with A. G. Wells, general manager of the Santa Fe Pacific Railroad Company, said defendant named herein, personally, at the county of Los Angeles, in said District, a certified copy thereof, together with a copy of the complaint, certified to by the Circuit Court clerk attached thereto.

Los Angeles, July 7th, 1902.

H. Z. OSBORNE,
*U. S. Marshal.*
By G. F. McCULLOCH,
*Deputy.*

12 [Endorsed:] Marshal's Doc. No. 476. No. 1027. U. S. Circuit Court, Ninth Circuit, Southern District of California,

Southern Division. Laurete Holmes, *vs.* Santa Fe Pacific Railroad Company. Summons. Filed Jul. 7, 1902. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Byron Waters, Waters & Wylie, Plaintiff's Attorney.

In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY, Defendant

*Demurrer.*

Comes now the defendant and for its demurrer to the complaint of the plaintiff filed herein says:

I.

That said complaint does not state facts sufficient to constitute any cause of action in favor of the plaintiff and against the defendant.

II.

That said complaint is indefinite and uncertain in this, to wit:

1. That it appears from said complaint that the plaintiff, at the time of the injury complained of, was an employee of the de-
13 fendant railroad company, and that his injuries were occasioned by a collision with another train being operated by coemployees, and the said complaint fails to show whether the negligence alleged in the fourth paragraph in said complaint, on the part of the defendant railroad company, was the negligence of coemployees, or of the defendant company itself.

2. That said complaint fails to disclose what the other personal injuries were, which the plaintiff received, and which are not specifically enumerated in the fourth paragraph of said complaint, but are included under the following words therein contained: "And other internal injuries."

III.

That said complaint is ambiguous in the same particulars wherein it is above specified to be uncertain and indefinite.

Wherefore, the defendant demands that said action be dismissed and that it recover its costs.

C. N. STERRY,
T. J. NORTON.
*Attorneys for Defendant.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

C. N. STERRY,
*Of Counsel for the Defendant.*

[Endorsed:] Original. No. 1027. U. S. Circuit Court, Ninth Circuit, Southern District of California. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. Demurrer. Received copy of the within demurrer this 26th day of July, 1902. Waters & Wylie, Attorney for Plaintiff. Filed Jul. 26, 1902. Wm. M. Van Dyke, Clerk. C. N. Sterry and T. J. Norton, 543-6 Bradbury Building, Los Angeles, Cal. Phone Red 1461. Attorneys for Defendant.

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At a stated term, to wit, the July term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Monday the sixth day of October, in the year of our Lord one thousand nine hundred and two—Present: The Honorable Olin Wellborn, District Judge.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY, Defendant.

*Order Overruling Demurrer.*

This cause coming on this day to be heard on defendant's demurrer to plaintiff's complaint, Byron Waters, Esq., and Winfred Wylie, Esq., appearing as counsel for plaintiff, and no counsel appearing for defendant to support said demurrer, and counsel for plaintiff having presented said demurrer to the court, it is now by the court ordered that said demurrer be, and the same hereby is overruled under and pursuant to rule 12 of the Rules of Practice of this court. It is further ordered that defendant have ten (10) days after notice of this ruling of the Court, within which to file defendant's answer to plaintiff's complaint.

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[Endorsed:] No. 1027. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Laurette Holmes, vs. Santa Fe Pacific Railroad Company. Copy Order. Filed Feb. 2, 1904. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States in and for the Ninth Circuit,

Southern District of California.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Answer to Plaintiff's Complaint.*

Comes now the defendant above-named, and for answer to the complaint of the plaintiff in the above-entitled action, denies and alleges as follows:

First.

I.

Denies each and every allegation, averment, matter and thing set forth in that portion of paragraph IV of plaintiff's com-
16 plaint, beginning with the word "without" in line eleven, page two of said complaint, and ending with the word "dollars" in line thirty, page two, of said complaint as therein alleged, or otherwise.

Second.

And for its second separate and further defence herein, the defendant alleges and shows to the Court:

I.

That by reference thereto it hereby makes as a part of this defence each and every allegation contained in its first defence and in addition thereto says:

That at and immediately prior to the receiving of the injuries complained of in his said complaint, said plaintiff contrary to and in violation of the express commands of defendant, and in disregard of his duties as engineer, controlled, managed and operated said engine and train of cars in such a careless and negligent manner as to cause the collision mentioned in said complaint; that said collision was, and whatever injuries plaintiff received on account thereof, were caused by the fault, neglect and carelessness of said plaintiff in disobeying the orders, rules and regulations of the defendant relating to the control and operation of his engine, and without any fault, neglect or carelessness on the part of said defendant, or its employees, other than said plaintiff, in any manner contributing thereto; that said plaintiff was at the time of the said injuries complained of, guilty of carelessness and negligence that directly contributed to and directly caused whatever injuries, if alleges and shows to the Court:

17 Third.

And for its third separate and farther defense, the defendant alleges and shows to the Court:

I.

That by reference thereto it hereby makes, as a part of this defense, each and every allegation contained in its first defense herein, and each and every allegation contained in its second defense herein; and in addition thereto says:

That if any injuries were received by this plaintiff, as alleged in his complaint (and which in this answer are denied), the same were the result of his own negligence and carelessness, as herein stated, and of the negligence and carelessness of his fellow-servants and coemployees upon the train, of which he was engineer, and the

negligence and carelessness of his fellow-servants and coemployees upon the train with which the engine plaintiff was engineer of collided, and that the same were not the result of any negligence on the part of the defendant railroad company.

Wherefore, defendant prays that plaintiff take nothing by this action, and that it have and recover of and from him its costs incurred herein.

C. N. STERRY,
*Attorney for Defendant.*

[Endorsed:] Original. No. 1027. In the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company (a corporation), Defendant. Answer to
18 Plaintiff's Complaint. Received a Copy of the Within Answer this 15th day of October, 1902. Byron Waters & Waters & Wylie, Atty. for Plaintiff. Filed Oct. 15, 1902. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. C. N. Sterry, Attorney for Defendant.

In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Southern Division.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Stipulation.*

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that the defendant may file in the above-entitled action an amended answer to the plaintiff's complaint, and that the above-entitled court may make and enter an order granting defendant permission to file such amended answer.

Dated this 25th day of June, 1903.

BYRON WATERS, AND
WATERS & WYLIE,
*Attorneys for Plaintiff.*
T. J. NORTON,
*Attorney for Defendant.*

19 In accordance with the foregoing stipulation it is ordered, adjudged and decreed that defendant above-named be and is hereby given permission to file an amended answer to plaintiff's complaint in the above-entitled action.

Dated this 27th day of June, 1903.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1027. U. S. Circuit Court, Ninth Ct. Southern District of California. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Co., Defendant. Stipulation and order. Received copy

of the within stipulation this 25th day of June, 1903. Waters & Wylie, Attorney for Plaintiff. Filed Jun. 27, 1903. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. T. J. Norton, 516 Conservative Life Building, Los Angeles, Cal., Phone Main 1466, Attorney for Defendant.

In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Southern Division.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Amended Answer to Plaintiff's Complaint.*

Comes now the defendant above-named and by leave of
20 Court first had and obtained files this its amended answer to the complaint of plaintiff on file in the above-entitled action and denies and alleges as follows:

First.

I.

Denies each and every allegation, averment, matter and thing set forth in that portion of paragraph IV of plaintiff's complaint, beginning with the word "without" in line eleven, page two, of said complaint, and ending with the word "dollars" in line thirty, page two, of said complaint, as therein alleged or otherwise.

Second.

And for its second, separate and further defense herein the defendant alleges and shows to the Court:

I.

That by reference thereto it hereby makes as a part of this defense each and every allegation contained in its first defense and in addition thereto says:

That at and immediately prior to the receiving of the injuries complained of in his said complaint, said plaintiff, contrary to and in violation of the express commands of defendant, and in disregard of his duties as engineer, controlled, managed and operated said engine and train of cars in such a careless and negligent manner as to cause the collision mentioned in said complaint; that said collision was, and whatever injuries plaintiff received on account thereof were, caused by the fault, neglect and carelessness of said plaintiff in disobeying the orders, rules and regulations of the defendant
21 relating to the control and operation of his engine, and without any fault, neglect or carelessness on the part of said defendant or its employees other than said plaintiff in any manner con-

tributing thereto; that said plaintiff was at the time of the said injuries complained of guilty of carelessness and negligence that directly contributed to and directly caused whatever injuries, if any, plaintiff received.

Third.

And for its third, separate and further defense the defendant alleges and shows to the Court:

That by reference thereto it hereby makes as a part of this defense each and every allegation contained in its first defense herein, and each and every allegation contained in its second defense herein, and in addition thereto says:

That if any injuries were received by this plaintiff, as alleged in his complaint (and which in this amended answer are denied), the same were the result of his own negligence and carelessness as herein stated and of the negligence and carelessness of his fellow servants and co-employees, and that the same were not the result of any negligence on the part of the defendant railroad company.

Wherefore, defendant prays that plaintiff take nothing by this action, and that it have and recover of and from him its costs incurred herein.

T. J. NORTON,
*Attorney for Defendant.*

[Endorsed:] Original. No. 1027. U. S. Circuit Court, Ninth Ct. Southern District of California. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Co. (a Corp.), Defendant. Amended answer to Plaintiff's Complaint. Received Copy of the within amended answer this 25th day of June, 1903. Waters & Wylie, Attorney for Plaintiff. Filed Jun. 27, 1903. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. T. J. Norton, 516 Conservative Life Building, Los Angeles, Cal., Phone, Main 1466, Attorney for Defendant.

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In the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTE FE PACIFIC RAILROAD COMPANY, Defendant.

*Stipulation.*

It is hereby stipulated between the parties to the above-entitled cause, by their attorneys, that the trial of this cause by jury be and it is hereby waived, and it is consented that all the issues in said cause be tried by the Court without a jury.

WATERS & WYLIE,
*Attorneys for Plaintiff.*
T. J. NORTON,
*Attorney for Defendant.*

[Endorsed:] No. 1027. In the Circuit Court of U. S. Ninth
23 Ct. So. Dist. of California. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific R. Co., Defendant. Stipulation. Filed Jun. 27, 1903. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. In the Circuit Court of the United States, Ninth Circuit, Southern

District of California, Southern Division.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY Defendant.

*Findings of Fact and Conclusions of Law.*

This cause came on regularly for trial on the 30th day of June, 1903 without a jury, the parties by their attorneys of record having filed with the clerk a stipulation in writing waiving a jury and the trial of said cause continued from said date to and including the 3d day of July, 1903, Waters & Wylie, appearing as attorneys for the plaintiff, and T. J. Norton and U. T. Clotfelter appearing as attorneys for the defendant and testimony having been introduced by the above-named parties herein and from the evidence introduced, the Court finds the facts as follows:

I.

That on the 20th day of November, 1901, plaintiff was in the employ of defendant in the capacity of locomotive engineer upon defendant's railroad, when at a point upon said railroad near Franconia without any fault on the part of the plaintiff, and by
24 reason of negligence and want of care on the part of the defendant through its train dispatcher, the engine upon which plaintiff was so performing his duty as engineer, came in violent collision with an engine and train operated in the opposite direction by the defendant up on the same track, and that by reason of said collision, this plaintiff was thrown from the cab of said engine to the ground and by reason of which, plaintiff was seriously and permanently injured in his person, and that by reason of the personal injuries so sustained, the plaintiff has sustained damages in the sum of $9,000.00.

II.

That the aforesaid collision was not, and the injuries and damages to plaintiff were not caused in any part by any act or acts of the plaintiff, and that said collision was not and the said injuries and damages to plaintiff either or both were not caused in any part by the fault, negligence or carelessness of the plaintiff in any manner whatsoever.

III.

That the aforesaid collision was not and the aforesaid injuries and damages were not the result of plaintiff's negligence and carelessness

as set forth in defendant's answer, or in any manner whatsoever, and the negligence and carelessness of his fellow-servants and coemployees or his fellow servants or coemployees nor of the negligence and carelessness or negligence or carelessness of any fellow-servant or coemployee or fellow servants or coemployees, but was caused wholly by the negligence and carelessness of the de-
25 fendant through its train dispatcher, together with the negligence and carelessness of a fellow-servant or fellow-servants, the negligence of each said defendant through its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damages.

IV.

That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders as to the movement of one of said engines and train.

*Conclusions of Law.*

As conclusions of law from the foregoing facts, the Court finds:

I.

That defendant's train dispatcher stood in the place of the defendant and for his negligence is liable to the plaintiff.

II.

That the plaintiff is entitled to judgment against the defendant in the sum of nine thousand dollars ($9000.00), together with the costs of suit in his behalf sustained or incurred. Let judgment be entered accordingly.

OLIN WELLBORN,
*Judge.*

[Endorsed:] Original. No. 1027. In the U. S. Circuit
26 Court, of the Ninth Circuit, State of California in and for the Southern District. Lauret Holmes, Plaintiff, *vs.* Santa Fe Pacific R. R. Co., Defendant. Findings of Fact and Conclusions of Law. Received Copy of the Within this 1st Day of Feb'ry 1904. T. J. Norton, Attorney for Defendant. Filed Feb. 2, 1904. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Win Wylie, 506 Bullard Block, 156 N. Spring St., Home Tel. 8438, Los Angeles, Cal., Attorney for Plaintiff.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY, Defendant.

*Judgment.*

This cause having come on regularly for trial on the 30th day of June, 1903, being a day in the January term, A. D. 1903, of said Circuit Court of the United States for the Southern District of California before the Court sitting without a jury, a jury having
27 been specially waived by the written stipulation and consent of the parties to said cause by their attorneys of record, filed with the clerk in said cause, Messrs. Waters & Wylie appearing as counsel for plaintiff, and T. J. Norton, Esq., and U. T. Clotfelter, Esq., appearing as counsel for defendant, and the trial having been proceeded with on said 30th day of June, 1903, and on the following 1st, 2d and 3d days of July, 1903, and witnesses having been sworn and examined, and documentary evidence having been introduced and the evidence having been closed, and the cause having been on said 3d day of July, 1903, submitted to the Court for its consideration and decision on briefs to be filed by the respective attorneys, and the said briefs having been filed and after due deliberation thereon, the Court having on the 28th day of December, 1903, made and filed its conclusions in writing herein and ordered that judgment be entered herein in favor of the plaintiff in the sum of $9,000.00 and that plaintiff's attorneys prepare and submit findings in accordance with said conclusions, and Court thereafter on the 2d day of February 1904, having filed its findings and decision in writing and ordered that judgment be entered herein in favor of the plaintiff in accordance therewith.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Lauret Holmes the plaintiff herein, have and recover of and from the Santa Fe
28 Pacific Railroad Company the defendant herein, the sum of nine thousand (9,000.00) dollars together with his the said plaintiff's costs herein taxed at $——.

Judgment entered February 2d, 1904.

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS, *Deputy*.

[Endorsed:] No. 1027. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Lauret Holmes, *vs.* Santa Fe Pacific Railroad Company. Judgment. Filed Feb. 2, 1904. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY, Defendant.

*Certificate of Clerk to Judgment-Roll.*

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Southern District of California, do hereby certify the foregoing to be a true copy of the judg-
29 ment entered in the above-entitled action and recorded in Judgment Book No. 1, of said court for the Southern Division, at page 491 thereof, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Attest my hand and the seal of said Circuit Court this 2d day of February, A. D. 1904.

[SEAL.]

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS, *Deputy*.

[Endorsed:] 1027. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Southern Division. Lauret Holmes, *vs.* Santa Fe Pacific Railroad Company. Judgment-Roll. Filed February 2d, 1904. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 1, page 491.

30 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Conclusions of the Court.*

First.—Train Dispatcher Moore, in directing the movements of trains Numbers 3 and 4, from whose collision plaintiff's injuries resulted, was a vice-principal. (Northern Pacific Ry. Co. *vs.* Mix, 121 Fed. Rep. 476.) Besides this case plaintiff in his brief, cites a great many other decisions, both Federal and State, to the same effect, but it is unnecessary to particularize them now, since Northern Pacific Ry. Co. *vs.* Mix, supra, is directly in point and authoritative in this court.

The cases of New England Ry. Co. *vs.* Conroy, 175 U. S. 323, 44 L. Ed. 181; Oregon Short Line *vs.* Frost, 74 Fed. Rep. 965; and

Maher *vs.* Union etc. R. Co, 106 Fed. Rep. 309, cited at page 17, *et seq.*, of defendant's brief, do not militate against the conclusion above announced, but, on the contrary recognizes the principles of law upon which it rests.

31 In the first the Conroy case, the Court quotes from Baltimore & Ohio R. Co. *vs.* Baugh, 149 U. S. 368, which last case, it was held, partially overruled Chicago, Milwaukee & St. Paul R. Co. *vs* Ross, 112 U. S. 377, as follows:

"'Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools and machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place the tools and the machinery than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place the tools and the machinery, owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that

32 reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.'"

In the second case, Oregon Short Line *vs.* Frost, supra, the Court says:

"It is conceded that the train dispatcher, in giving notice of a change in the running of trains acts for and in behalf of the railroad company. He is that respect a vice-principal, not because of his attitude to other employees as their superior, nor because he has charge of a department, but because of the nature of the duty which he discharges. He is, for the time being clothed with the responsibility which rests upon the company to furnish its employees a safe place of operation. The ordinary running of the train is established by a fixed schedule, of which all operatives have notice and by which their acts must be governed. When occasion arises to disturb the regular schedule, the duty rests upon the company to give timely notice to those that are to be affected thereby. This it is the office of the train dispatcher to do."

In the third case, Maher *vs.* Union etc. R. Co., supra, the Court says as follows:

33 "There is no conflict in the testimony, from which it clearly appears that the cause of the collision was not any fault, error, or negligence on the part of the train dispatcher for whose negligence the defendants would be liable, but that it was due solely to the negligence of the conductor and engineer of train No. 12, who were fellow servants of the plaintiff under the rules now established by the Supreme Court of the United States, and for that reason the defendants are not liable to the plaintiff for the results of their negligence."

In the Arizona case cited by defendants, Southern Pacific Co. *vs.* McGill, 44 Pac. Rep. 302, the Court said: "In this jurisdiction we are governed by the decisions of the United States Supreme Court, and this case is to be determined upon the principles set out in the following cases decided in that tribunal: Randall *vs.* Railroad Co., 109 U. S. 478, Railroad Co. *vs.* Baugh, 149 U. S. 368, Railroad Co. *vs.* Hambly, 154 U. S. 247." The Baugh case, as I have already shown, clearly recognizes the doctrine of vice-principalship growing out of the nature of the act performed by the servant, while neither of the other two cases antagonize said doctrine.

Furthermore, the responsibility of a railway company for injuries caused to or by its servants is, in the absence of legislative enactments, determinable by general, not local law. This proposition is supported by defendant's citation, Northern Pac. Ry. Co. *vs.* Mace, 63 Fed. Rep. 116, as well as by the citation of plaintiff, Baltimore & O. R. Co. vs. Baugh, 149 U. S. 368, 37 L. Ed. 772. See, also, Northern Pac. R. Co. vs *vs.* Hambly, 154 U. S. 347, 38 L. Ed. 1009, where the Court say:

34 "We have thus far treated this case as determinable by the general and not by the local law, as was held to be proper both in the Ross case and the case of Baugh. In so holding however, the Court had in view only the law of the respective States as expounded by their highest courts. Wherever the subject is regulated by statute of course the statute is applied by the federal courts pursuant to Revised Statutes section 241, as a 'law' of the State."

The Arizona statute quoted in defendant's brief is inapplicable here. That statute does not define nor purport to define the words "fellow-servant," but applies only to an agent or employee who is in the discharge of those duties which the master can delegate without liability to another employee for their careless performance, and not to an agent or employee who is charged with the positive duties of the master. If the construction contended for by defendant were the true one, corporations doing business in Arizona would be absolutely relieved from such positive duties, while those duties would still rest upon natural persons. I cannot think, that such a discrimination was ever contemplated by the legislature of that Territory.

Second.—Train number 3, which should have passed Yucca at 4:57, did so at 4:55 and train dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and in failing to so act, was negligent.

Without undertaking to review the evidence, it may be well to observe here, that, in my opinion, the statement of Moore to the operator at Yucca, that the latter's clock was two minutes slow,
35 and placing the figure 7 over the figure 5 on the train sheet, were subsequent to the collision, and but clumsy shifts of Moore, under great mental perturbation, to obliterate what seemed to him and in fact were unmistakable traces of the fatal negligence of which he was consciously guilty.

Third.—Said negligence of the train dispatcher, together with that of the conductor and engineer of train number 3 in running said train ahead of its time, caused said collision, and, therefore defendant is responsible for plaintiff's injuries. (Grand Trunk R. Co. *vs.* Cummings, 106 U. S. 700; Crew *vs.* St. Louis K. & M. R. Co., 20 Fed. Rep. 92; Young *vs.* New Jersey & N. Y. R. Co., 46 Fed. Rep. 161; Northwestern Fuel Co. *vs.* Danielson, 57 Fed. Rep. 919; Clyde *vs.* Richmond & D. R. Co., 49 Fed. Rep. 395; Chicago, R. I. & P. R. Co. *vs.* Sutton, 63 Fed. Rep. 395; Northern Pacific R. Co. *vs.* Poirer, 67 Fed. Rep. 885; The Joseph B. Thomas, 81 Fed Rep. 584; Maupin *vs.* Texas & P. R Co., 99 Fed. Rep. 51.)

Fourth.—Train Number 4 had sufficient time after leaving Powell to clear Number 3 at Franconia, if the latter train had been run in accordance with order Number 23, and therefore plaintiff was not guilty of contributory negligence.

While there is some conflict of opinion among the witnesses as to the time necessary to start a train, such as Number 4, from Powell, and clear an opposing train at Franconia it appears, if not incontestably, certainly by a decided preponderance of evidence that the collision occurred one mile west from the west switch
36 of the Franconia siding, and five minutes before train Number 3 was due at Franconia Station, 1250 feet east of said switch, and, that plaintiff, but for said collision, could have reached and placed his train Number 4, on said siding within two or three minutes thereafter, and this would have been two or three minutes before Number 3 was due at said station, while defendant's rule No. 385 only requires the train not having right of track to take siding and be clear of main track before leaving time of opposing train.

From the foregoing conclusions, it results, that defendant is liable for plaintiff's injuries and his damages will be assessed at nine thousand dollars.

Plaintiff's attorneys will prepare and submit findings in accordance with the foregoing conclusions.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1027. U. S. Circuit Court Southern District of California, Southern Division. Laurete Holmes, *vs.* Santa Fe Pacific Railroad Co. Conclusions of the Court. Filed Dec. 28, 1903, Wm. M. Van Dyke, Clerk. Chas N. Williams, Deputy.

37 In the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Bill of Exceptions.*

Be it remembered that this cause came on regularly for trial on the 30th day of June, 1903, before said Court without a jury, the parties by their attorneys of record having filed with the clerk of said court a stipulation in writing waiving a jury, Messrs. Waters & Wylie appearing upon said trial as attorneys for the plaintiff and T. J. Norton, Esq., and U. T. Clotfelter, Esq., appearing as attorneys for said defendant, and upon said trial the following proceedings were had:

LAURETE HOLMES was called and sworn as a witness on his own behalf and testified as follows:

My name is Laurete Holmes, age thirty-eight years; am a citizen of Texas and reside at Denison, Texas. On and prior to the 20th day of November, 1901, was employed as a locomotive
38 engineer by the defendant and was running between Needles, California, and Seligman, Arizona; had been employed in that capacity by defendant since February, 1901. On the 20th day of November, 1901, I was employed by the defendant as a locomotive engineer on a Limited passenger train consisting of two engines and five passenger coaches—Pullman vestibule cars, sleeping-cars, dining-car and parlor-car. The two engines were at the head of the train, my engine being up next to the train and Engine No. 444 ahead of me. There were printed rules and regulations in force at that time furnished by the company for the guidance of the employees of the defendant company.

Thereupon a document entitled "Santa Fe Pacific Railroad Company—General Regulations for Employees and General Rules—In effect October 22, 1897," consisting of thirty-three numbered pages, signed by A. G. Wells, General Superintendent, and approved by W. G. Nevin, General Manager, was shown to the witness and he testified concerning the same as follows:

That is a copy of the general rules in force on the 20th day of November 1901, for the government of the employees of the defendant company. I had familiarized myself with those rules prior to the date last mentioned. Upon my entering the employ of the company I passed an examination upon those rules conducted by an official of the company. That was in February, 1901.

Thereupon the above-mentioned document was offered,
39 received, read in evidence and marked Plaintiff's Exhibit No. 1; a full, true and correct copy of said document is

annexed and set out at the end of this bill of exceptions marked Plaintiff's Exhibit No. 1, and hereby made a part hereof.

The witness continuing said: While I was engaged as engineer for the defendant I had in my possession a printed time-table showing the schedule of my train.

Hereupon a document endorsed "S. F. P. R. R. Co., Arizona Division. Time-table No. 16, superseding Table No. 15. In effect June 16, 1901. To take effect Monday, November, 4, 1901, at 12:05 A. M.," was produced and shown to the witness and he testified concerning the same as follows:

That is a copy of the time-table I had in my possession. Thereupon said time-table was offered and read in evidence and marked "Plaintiff's Exhibit No. 2"; a full, true and correct copy of said time-table is annexed and set out at the end of this bill of exceptions, marked Plaintiff's Exhibit No. 2, and hereby made a part hereof.

The witness continuing said: On November 20, 1901, I had certain telegraphic orders in my possession governing the running of the train upon which I was employed. I would know those orders if I saw them or copies of them. My train on that date was No. 4 bound from Needles to Seligman.

Hereupon a certain document purporting to be Train Order
40 No. 23, dated November 20, 1901, and addressed "For Mellen," was shown to the witness and he testified concerning the same as follows:

That appears to be a copy of the order I received at Mellen.

Thereupon said last-mentioned document was received and read in evidence, and marked Plaintiff's Exhibit No. 3; the following is a full and true copy of said Plaintiff's Exhibit 3:

PLAINTIFF'S EXHIBIT No. 3.

'Form 31' (Form 31 Standard) 'Form 31'

SANTA FE.

Train Order No. 23.

Trainmaster's Office, Nov. 20th, 1901.

To C. & E. of No. 4. For Mellen.

No. 3 Eng. 482 will run two 2 hours late Kingman to Needles.

J. D.

Conductor and Engineman must both have a copy of this order.

| Time received | 4:22 A. M. | O. K. | Given at | 4:23 A. M. |
|---|---|---|---|---|
| Conductor | Train | Made | Time | Received by |
| Morse | 4 | Comp. | 4:45 A.M. | Finnegan. |

The witness continuing said: I got a telegraphic order governing the movement of my train previous to the one you have just shown me. I got the first order at Needles.

The witness was then shown a document purporting to be Train Order No. 22, dated November 20, 1901, and he testified concerning the same as follows:

41 I got a copy of that order at Needles. The copy I received at Needles was signed up complete.

Hereupon the last-mentioned document was offered and read in evidence and marked Plaintiff's Exhibit No. 4, the following is a full and true copy of said Plaintiff's Exhibit No. 4.

PLAINTIFF'S EXHIBIT No. 4.

'Form 31' (Form 31 Standard.) 'Form '31

SANTA FE.

Train Order No. 22.

Nov. 20, 1901.

To C. & E. No. 3. For Kingman.

No. 3 eng. 482 has right of track over No. 4 eng. 444 and 452 to Needles but will run 1 hour 50 minutes late Kingman to Needles.

J. D.

O. K. 4:13 A. M.

Conductor and Engineman must both have a copy of this order.

The witness continuing, said: There was no other order given me that morning governing in any wise the running of my train. The order Plaintiff's Exhibit No. 3 was received by me at Mellen. I suppose that Finnegan, the man who signed as having received the order was the operator. The name Morse under the title "Conductor" refers to the conductor on No. 4. Morse was the conductor on my train No. 4.

42 The word "complete" and figures "4:55 A. M.," written on Plaintiff's Exhibit No. 3 indicates that that order was received and signed by Morse, the conductor, at 4:45 A. M. It was received by the conductor at Mellen. The letters "J. D.," signed to that order means John Denair, the superintendent of that division. The order Plaintiff's Exhibit No. 4 was received before we started from Needles on our trip. My train left Needles on that trip about 4:20 or 23. The schedule time of departure was 4 A. M. We were some twenty minutes late. We had no other orders except those contained in the general rules and these telegraphic orders and the time table. I do not remember the time our train arrived at Beal Station. We arrived at Mellen about 4:42 or 3. I was familiar with this time-table Plaintiff's Exhibit No. 2 at that time. We stopped at Mellen about three or four minutes. Powell was the next station east and we stopped there. We arrived at Powell at 5:00 A. M. We left the switch at Powell about 5:03 or 4, and proceeded about four or five

miles further—I do not know the exact distance—when this collision occurred. The collision occurred between Powell and Franconia. I did not know anything about the collision until about eight days afterwards. My train was run from Needles to the place of the collision on telegraphic orders. These orders Plaintiff's Exhibits No. 3 and 4 notified us that Train No. 3, westbound from Kingman to Needles, was given the right of track and would run two hours late. The time-table Plaintiff's Exhibit No. 2 showed what No. 3's schedule time was. We were not given any order specifying the
43 place we were to meet No. 3. The only guide we had with reference to the place of meeting and passing No. 3 was the time-table and the telegraphic order by which we were notified that No. 3 would run two hours late. These orders gave No. 3 the right of track over me and notified me that No. 3 would run two hours late. Therefore I had a right to go on until I could get out of the way of No. 3. There was no order given fixing the meeting point for these trains No. 3 and No. 4 on this occasion. The train having the right of track has a perfect right to run within its time limits. That is, No. 3 under these orders had a right to proceed while running at least two hours behind its schedule time as fixed by the time-table. I believe there is a general rule giving the train dispatcher the right to give an order of that kind. There is a difference between the different classes of trains in respect to their clearing. Trains of the first class can clear each other to a second. A train of an inferior class must clear a train of the superior class by at least five minutes. Both these trains, No. 3 and No. 4, were first-class trains. When we left Needles on the morning of the 20th of November we were given a clearance card. That is a paper that gives you the right to hold the main line and designates the number of your train. This card came from the dispatcher's office. On the morning of November 20th before going to my train I compared the time shown by my watch with the standard watch situated in the office at Needles and registered my watch. I then went to my engine.
I looked the engine over to see whether it was in repair, and
44 found that the headlight was out of repair. I found the night foreman and a machinist there repairing the electric headlight on my engine. According to the custom and practice my engine should have been in the lead on that train, but owing to the headlight on my engine being out of repair I was ordered by the night foreman of the defendant company to place my engine up against the train and the other engine was placed in the lead. As soon as the train was ready upon a signal from the conductor we left Needles. We went to Mellen before we stopped. We arrived there about 4:42 or 3, and stopped three or four minutes. When we got to Mellen the semaphore was against us. That meant that there was something there for us, and we stopped, and there was delivered to us this order Plaintiff's Exhibit 3, notifying us that train No. 3 was running two hours late. At Mellen I conferred with the engineer in charge of the lead engine with reference to the point to which we should proceed and clear train No. 3. Considering the time-table and

these telegraphic orders together we were able to determine the time train No. 3 was due to leave Franconia. We concluded that we could reach Franconia and clear the main track before that time. Powell was the next station east from Mellen. It is 6.8 miles east of Mellen. We left Mellen in the neighborhood of 4:45. According to the time-table and these telegraphic orders Train No. 3 ought to have been at Kaster at 4:45. According to the time-table they were due at Kaster at 2:45, and as they were running two hours late that would make it 4:45. Kaster is 34 miles east from Mellen. We arrived at Powell at 5 o'clock. According to the time-table and these telegraphic orders, No. 3 at 5 o'clock ought to have been between Yucca and Haviland. Leaving Powell we passed over the east switch at 5:03 or 4. According to the time-table and these telegraphic orders, No. 3 was due at Franconia at 5:17. Franconia is the next station east of Powell, and the station-house at Franconia is 5.8 miles east of the station-house at Powell. The distance between the switches is may be 100 or 150 yards less. When we left Powell we had from between 5:03 and 4 to 5:17 to go to Franconia and clear the main track. That is, we had twelve or thirteen minutes from the time we passed over the east switch at Powell to go to Franconia and get upon the side track. The running time of our train from Powell to Franconia was 10 minutes. That is what it shows on the card. We could reasonably have made the run in ten minutes. We had covered about four miles of the distance when the collision occurred. We had about a mile farther to go. I looked at my watch a very few seconds before the collision occurred. When I looked at my watch it was about 5:12. We still had five minutes to go to Franconia and clear the main track. It would only have taken us about a minute or a minute and a quarter to have gone to Franconia and cleared the main track. We would have had about three and a half minutes to spare. McEligot was the engineer on the lead engine on Train No. 4. He is dead. Conductor Moore was conductor on my train. When I regained consciousness after the accident I found myself in the Sisters' Hospital in Los Angeles.

Cross-examination:

I had a little over three years' experience as a locomotive engineer before being employed by defendant. I was examined as to my qualifications before I was employed by defendant. I had been a fireman before I was employed as engineer, and prior to that was a machinist. On the occasion in question as we approached Mellen we found the semaphore turned against us. That was a signal given by the agent at Mellen for our train to stop. We had run from Needles to Mellen on the order Plaintiff's Exhibit No. 4, giving Train No. 3 the right of track and notifying us that that train would run one hour and fifty minutes behind time. At Mellen we received the second order, Plaintiff's Exhibit No. 3, notifying us that train No. 3 would run two hours behind time.

By DEFENDANT'S COUNSEL:

Q. I will ask you to state, as an experienced railroad man, whether this order running two hours late which you received at Mellen was a proper and sufficient order for you to run on?

A. Yes, sir, that is what it had the appearance to me.

Q. Do you know whether it was or not, as a railroad man?

47 A. As far as I can remember, yes, sir.

Q. Was the order that you received at Needles a proper and sufficient order for the running of your train?

A. Yes, sir, I think so.

The witness continuing said: In this order, Plaintiff's Exhibit No. 4, they made a mistake in the number of my engine. I was running engine 450 instead of engine 452. The running time from Mullen to Powell is about nine minutes, and from Powell to Franconia ten minutes. That is the running time between these points for limited trains, according to the time table. When these trains are on time neither of them stop at either Mullen, Powell, Franconia, or Haviland. In this running time of ten minutes between Powell and Franconia no allowance is made for stopping and placing a train upon a switch or siding. We had three minutes over the running time to place our train on the siding at Franconia. That is more time than was required for that purpose. McEligot, the engineer on the head engine, stopped our train at Powell. The oil on his engine was not hot enough to flow into the burner properly, and he had to wait on it to force the air. This occurrence happens more or less frequently. When my train stopped I got off and went ahead to inquire why the stop was, Engineer McEligot was on the ground cutting his air when I got there and Conductor Moore walked up about that time. When I say that while passing over the east switch at Powell and going at a speed of twenty-five or thirty miles an hour I had thirteen

48 minutes to make Franconia, I mean that it was thirteen minutes from that time to the time train No. 3, according to the time table and the telegraphic order, was due at Franconia. We would have arrived at Franconia at 5:14, and train No. 3 was not due there until 5:17. When these trains were running on time, according to this time table, Plaintiff Exhibit No. 2, train No. 4 as a rule had the right of track, and under those conditions the west bound train, No. 3, whenever it was behind time, had to look out for and keep clear of the eastbound train, No. 4. On this particular occasion the right of track had been reversed and given to train No. 3, and our train, No. 4, was required to look out for and keep clear of train No. 3 when train No. 3 was within her time. The time table and the telegraphic orders we had on this occasion did not necessarily fix the meeting point for those two trains. When there is a positive meeting order made for two trains, neither can leave that meeting point until the other has arrived.

By DEFENDANT'S COUNSEL:

Q. That is true. But I say that giving No. 3 the right of track and putting it two hours late, and putting these two orders with this time-card, were you not following this time-card with that variation?

A. With the variation of two hours.

Q. Running just exactly as if they had been on time, so far as looking out for each other was concerned?

A. Yes, sir.

49 The witness, continuing, said: I did not mean to say that I received a clearance card at Needles giving our train the right of track. I meant to say that we were given the right of track on clearance. The clearance card notifies the conductor and engineer of the number of their train and where they are going. It is given to them just before they depart. When I looked at my watch and saw that it was 5:12, we were very near to the point of the collision; it was only a very few seconds—it wasn't hardly the flash of an eye—after that when the collision occurred. I looked at my watch at Mellen, and also at Powell. I do not remember whether I looked at it between Powell and Franconia other than the time I have just mentioned. I had all kinds of time. I was running at the time of the accident from forty to fifty miles per hour. I had lots of time; there was no use to worry about it as far as that is concerned.

Q. Is the order No. 23, Plaintiff's Exhibit No. 3, a proper and sufficient order for these trains to follow?

A. The order was all right, I guess.

Q. What length of time would it have taken you to get onto the siding at Franconia, did you think?

A. We could have cleared it in about a minute, I think. McEligot, the engineer of the lead engine, was in full control of the train. I had no control over handling this train beyond giving steam at McEligot's signal. The lead engine controls the

50 brakes. There is a code of signals prescribed in the rules for signaling back and forth between engines on the same train. I had known McEligot during all the time I had been with the defendant company. He had been in the passenger service during all that time.

Redirect examination:

I do not know personally just how far we were from Franconia at the time of the collision. Our time-table speed between Powell and Franconia was thirty-one or thirty-two miles an hour. On this particular occasion we were running faster, about forty or forty-five miles an hour.

*Deposition of E. L. Moore.*

The deposition of E. L. MOORE as a witness on behalf of plaintiff, taken on written interrogatories, direct and cross, and in accordance with and subject to the terms and conditions of a stipulation in writing made by and between the parties in this cause, which provided among other things, that said deposition, when taken and returned into said court, might be used by either party to this cause subject to any and all objections which might be taken if the witness were personally present and testifying in this cause in said court, except only objections as to the form of the interrogatories, was

offered in evidence, and the reading of the same in evidence on behalf of plaintiff was proceeded with subject to the right of defendant to make objections to any portion or portions thereof and have
51 the Court rule upon said objections before said portion or portions of said deposition were read in evidence.

The witness, in answer to the first four direct interrogatories, testified as follows:

My name is Edward L. Moore. On November 20, 1901, my occupation was train dispatcher. On the morning of that day I was working as train dispatcher at Needles, California, for the Santa Fe Pacific Railroad Company.

"Interrogatory No. 5. Did the operator at Yucca, Arizona, telegraph you anything as to the passage of Train No. 3 through Yucca on that morning"?

Objected *as* by defendant as hearsay, incompetent, and that the operator at Yucca was the only person competent to testify to the passing of the train, or as to the time that train passed that station; the objection was by the Court overruled, and defendant then and there duly excepted.

Exception No. 1.

"Answer to Interrogatory No. 5. I answer yes, he did."

"Interrogatory No. 6. If you answer Interrogatory No. 5 in the affirmative, state what it was that he telegraphed you, and at what time did you receive the telegram or telegrams."

Objected to by defendant on the grounds that said interrogatory and the evidence sought to be elicited by said interrogatory and the answer thereto is hearsay, incompetent, irrelevant and immaterial, and that the operator at Yucca is in the courtroom and is
52 the only person competent to testify as to the time Train No. 3 passed Yucca, or to testify as to any communication that he made to Train Dispatcher Moore, and on the further ground that no foundation has been laid for the introduction of the testimony by showing the facts of the circumstances of which testimony is intended to be notice to the defendant; the objections were by the Court overruled, and defendant then and there duly excepted.

Exception No. 2.

"To direct interrogatory No. 6 I answer: I received the message at about 4:58 o'clock A. M. that Train No. 3 had passed there at 4:55 A. M. This is my recollection in the matter."

"Interrogatory No. 7. Did you or did you not make the figures 4:55 opposite the word 'Yucca' on the train sheet you were using that morning"?

Objected to by defendant on the ground that it refers to a paper, a train sheet, not in evidence in the case, and for the reason that any answers made upon the train sheet would be hearsay and for the reasons that it is incompetent, immaterial and irrelevant, and it assumes *that* the existence of a fact which has not yet been proven.

Hereupon the reading of said deposition was suspended for the purpose of allowing counsel for plaintiff to introduce evidence showing a proper foundation for said interrogatory 7.

53 Thereupon JOHN DENAIR was called and sworn as a witness on behalf of the plaintiff and testified as follows:

On the 20th of November, 1901, I was superintendent of the Arizona division of the railroad of the defendant. I was the duly acting superintendent of that division at the time of the Franconia wreck. At that time there was a train dispatcher by the name of E. L. Moore employed at the office of the of defendant at Needles Station. There were six trick dispatchers, and two chief dispatchers employed in that office at that time E. L. Moore was known as a trick dispatcher. Moore was in charge of and issued orders as "J. D." During the portion of the day, November 20, 1901, the letters "J. D." written on these telegraphic orders are my initials, the initials of the superintendent under which the orders were given. In the administration of the affairs of that train dispatcher's office at Needles orders issued to trains and known as 31 and 19 orders are issued and copies of them preserved in the following manner: A train dispatcher will frame an order and send it to the operators who are to deliver it, and they will repeat it back to him, and as it is repeated back he copies it into a book which is known as the Dispatchers' Record Book. That is the only way that business can be handled. There is no rule providing for copying these orders. There is a rule providing for the issuance of 31 and 19 orders which are presumably under the standard code, but there is no rule as to whether

54 the dispatcher or the operator shall be the copyist. Rule 459 of the general rules and regulations of the company provides for the form of thirty-one orders and for other different forms which are admissible. There was also kept in that office a book known as "Consists of Trains," which means what the trains consist of, the number of engines and the number and character of cars. There is also kept what is known as a train sheet. On it are shown the numbers of trains and engines and cars. These train sheets are made up by filling out printed blanks. The printed blank forms of these train sheets for that office at that time were furnished and prescribed by the defendant company. They were furnished for keeping a record of the trains and their consists. I believe that there was a train sheet at the dispatchers' office at Needles on the day of the Franconia wreck. They are used every day, and there must have been one in use on that day. The object and purpose of the train sheet is to show the number of the different trains, what are known as time-card trains, the numbers of the engines, numbers of cars, the numbers of all regular trains and all extras, which are designated as extra 670 West or 670 East as the case may be; showing the number of cars, showing the name of the engineer on each engine, the name of the conductor in charge of each train, and the time they leave the terminals and arrive at terminals, and pass intermediate points and stations. This train sheet is kept by the train dispatcher for the purpose of enabling him to intelligently handle

55 the trains over a district; in fact it would be impossible for him to handle a number of trains as you see on that sheet without he had some such contrivance as that. The object of the train sheet is to enable the train dispatcher to have before him

the positions of the different trains upon the division at the same time.

Hereupon counsel for plaintiff presented and offered a certain document admitted by counsel for defendant to be the train sheet used in defendant's train dispatcher's office at Needles on the morning of November 20, 1901; thereupon counsel for defendant stated that he desired to object to the offer, and asked leave to cross-examine the witness, John Denair, before stating his objection; leave to cross-examine was thereupon granted.

Cross-examination:

I stated that these train orders, Plaintiff's Exhibits Nos. 3 and 4 bore my initials. The train dispatcher had authority to sign my initials to train orders, but had no authority to sign my initials to any other kind of correspondence, telegraphic or otherwise. There are several reasons why it is absolutely necessary to use the initials of some one in authority on train orders. These six dispatchers working during the period of twenty-four hours, if each of them had authority to sign initials to train orders the men who received the orders would get badly mixed up, especially as we change dis-
56 patchers quite frequently. When the orders are signed by the initials of the superintendent or trainmaster the men know all the time who gives the orders over whose signatures the orders are put out. During the twenty-four hours of each day there are six trick dispatchers besides the two chief dispatchers employed in the office at Needles. All of the orders are signed with the initials "J. D." for the purpose of uniformity and avoiding any confusion in the minds of the trainmen. The train dispatchers have no authority beyond this to sign the initials "J. D." The record of the company respecting the movements and the places and times of moving trains are the orders that are issued to the trains and recorded in the train dispatcher's book. The train sheet is the record of things reported to the dispatcher as far as the movements of the trains is concerned. It is the regular things that are reported to the dispatcher from out on the line. For information concerning the orders for the movement of trains we reply upon the record of those orders in the train dispatchers' book. The proper framing of the orders is provided for in the rules and regulations. The record of the time the orders are O. K.'d is the order-book. That is not shown on the train sheet at all. The time the order is put out and the time it is O. K.'d is shown in the order-book and not on the train sheet.

I have no information as to the truth or correctness of any of the entries made upon this train sheet (referring to the train sheet
57 presented and offered by counsel for plaintiff as aforesaid.) I did not make any of the entries on that train sheet.

Hereupon defendant objected to the introduction of the train sheet in evidence on the grounds that it does not appear that the witness made any of the entries upon it, or knows anything about their correctness; that it is a memorandum and not a record, and for the reason that it does not appear that the maker of the memorandum had any knowledge as to the facts related; the objections

were by the Court overruled, and defendant then and there duly excepted.

Exception No. 3.

Thereupon said train sheet was received and read in evidence and marked "Plaintiff's Exhibit No. 5."

Said train sheet is entitled "Form 1544 B Special—Santa Fe Pacific Railroad Company—Arizona Division—4th District, Train record—Needles, Wednesday, Nov. 20th, 1901," and is hereby made a part hereof, and defendant now asks that this Court by its order direct the clerk of this court to attach said train sheet. Plaintiff's Exhibit No. 5," to this bill of exceptions.

Hereupon the reading in evidence of the deposition of the witness E. L. MOORE and all proceedings relative thereto were resumed, and counsel for defendant, in addition to the objection heretofore made, objected to direct interrogatory No. 7 and the answer thereto on each of the grounds and for each of the reasons specified in his
58 objection to interrogatory No. 6 and the answer thereto; said objections were by the Court overruled, and defendant then and there duly excepted.

Exception No. 4.

COUNSEL FOR DEFENDANT: It might be understood that I object to all questions on this line of testimony for any of the reasons that I have heretofore stated.

The COURT: Each question in relation to this train sheet is objected to by counsel for defendant on the grounds stated in the last objection and the preceding objections, and the objection is considered overruled and the defendant excepts. It is fully understood that this testimony is being objected to in every way that you can object to it.

"To direct Interrogatory No. 7 I answer: I did."

"Direct Interrogatory No. 8. If you did not, state who did, if you know. To Direct Interrogatory No. 8 I answer: I did it myself."

"Direct Interrogatory No. 9. At what time were the figures 4:55 placed opposite the word 'Yucca,' written on that train sheet, and why?"

"To direct Interrogatory No. 9 I answer: They were placed there about 4:58 or 4:59 A. M. on November 20, 1901, and I placed them there because the operator at Yucca reported the train by there at 4:55."

"Interrogatory No. 10. State whether or not you ever wrote the figure '7' opposite the word 'Yucca' on the train sheet? To
59 direct interrogatory No. 10 I answer: I did write it."

"Direct Interrogatory No. 11. If you answer interrogatory No. 10 in the negative, do you know who did? To direct interrogatory No. 11 I answer: I did it myself."

"Direct Interrogatory No. 12. If you answer interrogatory No. 11 in the affirmative, state who wrote the figure '7' opposite the word 'Yucca' on the train sheet of November 20th, 1901, in the column devoted to train No. 3? To direct interrogatory No. 12 I answer: I did it myself."

"Direct Interrogatory No. 13. Do you know when the figure '7'

was placed in the column devoted to train No. 3 on the train sheet of defendant of the morning of November 20th, 1901? To direct interrogatory No. 13 I answer: As near as I can remember it was between 4:58 and 4:59 on that morning."

"Direct Interrogatory No. 14. If you answer in the affirmative state when it was. To direct interrogatory No. 14 I answer: I have answered this in the preceding answer, and will say that so far as I can remember it was a few seconds after the accident occurred."

"Direct Interrogatory No. 15. State circumstantially and in detail all you know regarding the writing of the figures 4:55 and 4:57 in the column devoted to train No. 3 opposite the word 'Yucca' on that train sheet of defendant company of November 20th, 1901? To direct interrogatory No. 15 I answer: I have stated that I
60 placed those figures there myself, and I wrote them. I write the 4:55 just before the accident, and placed a '7' over the second 5 just after."

"Direct Interrogatory No. 16. State if you know of any defect or defects in the system of train dispatching which was in use at that time in any way relating to the collision of trains No. 3 and 4 on the morning of November 20th, 1901? To direct interrogatory No. 16 I answer: There was none whatever. It was the system being used on all best roads."

"Direct Interrogatory No. 17. Why does the said train sheet fail to show the time that train No. 3 passed through Franconia on said morning? To direct interrogatory No. 17 I answer: During the conversation which I had with the operator at Franconia the collision occurred, and on account of the excitement I failed to place the time on the sheet."

Cross-examination:

I was first employed as train dispatcher for the defendant company by J. W. Dickerson in Texas, and was then transferred to Needles by A. W. Towsley, superintendent of transportation. While I was employed as train dispatcher for the defendant company I reported to the chief dispatcher. While I was employed as train dispatcher for the defendant company I never had any authority to employ or discharge telegraph operators on the line of railroad of the defendant. I have been engaged in the business of telegraph operating about
61 twenty-five years. I had about twenty years' experience as train dispatcher prior to being employed by the defendant. I had been employed as train dispatcher for the defendant company at Needles only for a few months prior to November 20, 1901, but I do not know the exact time. Prior to entering the employ of the defendant I had been employed as train dispatcher by the G. C. & S. F. Ry. Co., the Baltimore & Ohio, the Pennsylvania Central, and the Rock Island. At the time I issued the order as train dispatcher to trains Nos. 3 and 4 on November 20, 1901, I was acting under the general system, and those orders were issued in accordance with the rules and regulations of that system.

JOHN DENAIR was recalled as a witness for plaintiff and testified as follows:

I know the point where the Franconia wreck occurred on November 20, 1901. I was upon the ground at that point about 6:15 or 20. The collision occurred about a mile and a quarter west of Franconia. That is, about a mile and a quarter west of the middle of the siding at Franconia. The siding is about 2,500 feet long. The record of train orders is kept in book form and the same as the orders you have that are on file here. I suppose that that book is on file where the balance of the books are on file. They are kept in a filing room under the control of the superintendent with the balance of the records for the division. I have not got that book with me. It was not the practice for the operators to make reports to me or my office

62 of the time of departure of trains from their respective stations. We understand and interpret Rule 475 of Plaintiff's Exhibit No. 2, wherein it is provided that "operators will properly record and report to the superintendent time of departure of all trains and the direction in which extra trains are moving," as being complied with by a telegraph operator at a particular station when he sends his dispatch to the train dispatcher on duty, giving the time of departure of each train. They record this time by making a note or memorandum of it on the desk in front of them, and report it by telegraph as soon as they can to the train dispatcher. No record of the time of departure of trains is kept except at district points and junction points; that is, points of junction with other railroads. It is my understanding that Rule 475 does not require operators at stations to make or keep any record or report time of departure of a train after he has notified the train dispatcher of the time of departure of the train. When I was on the ground the morning of the wreck I did not see Mr. Holmes that I remember of I saw Engineer McEligot, Conductor Morse, and Conductor Stevenson. Morse was conductor on Holmes's train. When I saw him that morning he was lying on a stretcher. Engineer McEligot was lying beside the track. The only member of the crew on train No. 3 on duty at that time was one of the brakemen, and of the crew on train No. 4 only one was on duty; he was one of the brakemen.

*Deposition of F. H. Smith.*

63 The deposition of F. H. SMITH, taken as a witness on behalf of defendant, was read in evidence on behalf of plaintiff, said witness testifying as follows:

My name is F. H. Smith; age, 25. I am a telegraph operator. I remember the Franconia wreck that occurred on November 20, 1901. I was the night operator at Franconia Station at that time Franconia was a telegraph station on the line of defendant's railroad. Yucca was the next telegraph station to the east of Franconia. There was a telegraph office at Kingman, and I think one at Drake, between Yucca and Kingman. Mellen was the first telegraph office to the west of Franconia. There was no telegraph office at Powell. My hours on duty were from 6:30 in the evening until

6:30 in the morning. The collision between trains Nos. 3 and 4 occurred about two miles west from Franconia. I arrived at the scene of the wreck about twenty minutes after it occurred. Franconia was not a stopping station for either of these trains, according to the regular schedule. Train No. 3 passed Franconia that morning before the wreck. I noted the time that it passed. The time was 5:11. I was on duty at the time.

Cross-examination:

I had no communication with train No. 3 that morning. It did not stop at Franconia. It passed at 5:11. I do not remember now just what time train No. 3 was due at Franconia on that trip. My remembrance is that they were six minutes ahead of time; that is, with reference to the time they were due at Franconia while running two hours behind the regular schedule; they passed six
64 minutes ahead of time. I did not have any orders for either No. 3 or No. 4 that morning. It occurred to me that train No. 3 was running much faster than ordinarily as it passed Franconia that morning. I heard the crash of the two trains. I do not know the time I heard the crash. Immediately after No. 3 passed I reported the time. I reported it passing at 5:11. I think I made this report before 5:12, because I reported almost the instant they were by. I made the report to the train dispatcher at Needles by telegraph. A gentleman by the name of Moore was on duty at that time as dispatcher. I made my report in these words, "O. S. Fa. No. 3 by 5:11." "Fa." was my office call. There is a good deal of controversy as to the real meaning of the letters O. S., but it is simply the call we make when we report a train by. Instead of referring to it as reporting the train we say "O. S." I do not know what O. S. stands for. It means the reporting of a train. My report was answered immediately. He asked me if I was sure that No. 3 had gone. When I told him they were gone he said he did not understand it. He said "I don't understand it." That was all he said to me just at that moment. He then called Kingman and asked if he had delivered Order No. 23. By that time I had heard the crash and told him that they had gone together, and then we had some conversation. Order No. 23 was to the effect that No. 3 would run two hours late from Kingman to Needles. The train dispatcher two hours late from Kingman to Needles. The train dispatcher asked the operator at Kingman if the order had been put out at
65 Kingman—whether he had delivered the order. I had nothing to do with it. I read the message from Moore to Kingman as it went over the wire. As near as I can remember it was "Did you deliver Order No. 23 to No. 3"? The reply from Kingman was that he had made the delivery and had the conductor's signature. By that time I had heard the crash and notified Moore, and then I told him that I would call the section men, or rather some bridgemen that were camped on the siding there and he asked me if I was sure that the trains had collided and I told him what the indications were. There was an operator at Yucca at that

time. It was about twelve miles from Mellen to Franconia. The dispatcher did not ask me anything about Mellen or No. 4. All of my conversation with the train dispatcher related to Franconia. I would not know of any message being telegraphed to Mellen, unless I just happened to hear it. I did not hear the train dispatcher say anything to Mellen. I did not hear him say anything to Mellen about train No. 4. There was no telegraph station between Mellen and Needles. I do not think it was three minutes after No. 3 passed Franconia before I heard the crash. I did not see any light at the place of the accident. There was a hill between and I could not have seen it from Franconia. I climed the semaphore pole, but was unable to see anything from that except when the wreck caught fire. I suppose that is what it was I could see the light flaring. When I saw these
66 lights I was at Franconia and up on the semaphore pole. I was not acquainted with Moore. I had heard of him at that time. I had been telegraph operator five or six years. I worked a year on the Rock Island. There was no day operator at Franconia. In case they wanted a man through the day, they called the night operator. In case they wanted him to go on duty they had a trainman call him. He would stop and pound on the door or something of the kind to wake him if he was asleep. I had been working as telegraph operator on that division of the defendant's railroad from February 15 until November 20. I do not know how long Train Dispatcher Moore had been working on that division. I was working most of the time on the west end, and he was working on the east end. East of Needles is what we call the east end and has one set of dispatchers, and there is another set of dispatchers for the division west of Needles. I had worked under Mr. Moore for about five or six weeks before this accident. I had not noticed anything particular regarding his attention and carefulness in the performance of his duties. Had not noticed that he was careless or anything of the kind, and had not taken any particular notice of him as being especially careful. There was nothing observable in that regard one way or the other. He seemed to be rather observant; he seemed to be always attentive to business. During that time I do not think he ever dropped out a day; not that I know of while I was working with him. I think he was always on duty during his hours.
When I reported No. 3 by he asked "Have they gone?" I went
67 to the door first to make sure that they were gone. I thought perhaps they might have backed in on the siding, and I came back and told him they were gone. When I went to the door I saw No. 3 down the track quite a ways. I saw red lights on the rear of No. 3. The train and lights were moving to the west. He next said, "I don't understand it." I testified at the coroner's inquest at Kingman. The coroner's name was Smith. I do not remember his first name. I testified at that time that "I reported them (No. 3) by at 5:11 if my watch was right," and testified that my watch could not have been more than half a minute out of the way. No. 3 running two hours late was due to pass Franconia at 5:17. I did not know what their orders were when they went by. I re-

ported them to the dispatcher not later than 5:12, and he asked me if they were gone for sure." I do not know whether I used the words "for sure," but I am quite positive that he did not say that. He just said "Are they gone?" Of course, my memory was better then than now. I gave my testimony before the coroner two or three days after the accident. After the train dispatcher called up Kingman he had a further conversation with me and he told me that No. 4 was supposed to have made Franconia before them, referring to No. 3. He did not say that he did not understand why No. 4 had not made there, but why they did not stop there for No. 4. He did not say anything about having ordered No. 4 to sidetrack at Fran-
68 conia. I did not note particularly by means of my telegraph instruments the progress of No. 3 as it came toward Franconia. I heard them reported out at Kingman. I do not remember whether I did at Yucca. I never worked in the train dispatcher's office. I did not keep any record at Franconia except a record of the time trains went by. We generally kept that record in a little book, but there is no regulation. Sometimes I have had a station where there was no book and kept it on paper. I do not know whether we had it in a book at Franconia or on paper. Two or three days after the collision I made a report by letter to Mr. Denair. I made this report on Mr. Denair's verbal request. He asked me to write a letter stating what I knew of the circumstances of the collision. I do not know where Mr. Moore is now. He was still working in the dispatcher's office at Needles when I left that division in June, 1902. I have seen Mr. Moore. He is rather dark, middle aged. I ceased to work for the defendant company in November, 1902. I am not working at present. Since that time I have *have* worked some for the United States Geological Survey. I quit working for the company on account of my health. I was quite familiar with the rules and regulations of the company. Neither of the orders given to these trains was communicated to me. There were three orders put out at Kingman that night for train No. 3. I heard one or two of them when they were sent over the line, but whether I noticed Order No. 3 when it was communicated to Kingman I
69 do not know. I am sure I heard some of these orders because I knew that the train was about two hours late.

Hereupon E. E. KENDRICK was called and sworn as a witness on behalf of plaintiff and testified as follows:

I am a telegraph operator engaged at Hinckley, California, in the service of the defendant company. I was employed as telegraph operator at Yucca Station on the line of defendant's railroad on November 20, 1901. I was on duty when train No. 3 passed Yucca Station on that day, and reported the passage of that train by Yucca to the train dispatcher's office at Needles. I made a report a few minutes, probably three or four minutes after the train passed. I reported it by at 4:55.

Cross-examination:

I was asked about my time shortly afterwards by Dispatcher Moore. He called me up a few minutes after I reported the depart-

ure of train No. 3, and he said "What time have you got?" I gave him the time—I forget now what it was—4:51 or 2; something along there, and he said "Your clock is 2 minutes slow," or such a matter; somewheres along there. I do not remember the exact time he called me up. I- was something after the time I reported the train. He stated to me that my time was wrong two minutes or such a matter.

70 LAURETE HOLMES was recalled in his own behalf and testified as follows:

I have been in the train dispatcher's office at Needles several times. I have always noticed them handling the train sheet, especially O. S. of train through different stations. They always mark it on the different sheets as soon as they get it from the operators along the line. I have always noticed that it is not advisable for a man to hold any conversation with the train dispatcher when he is at work. He always seems to be too busy to talk to you. There is no person on duty except the train dispatcher who exercises any kind of control over the movement of trains. The train dispatcher has the sole control of the movement of all trains on the division he is working on. For instance, it would not make any difference if the president of the road, or the general superintendent of the road was to come to me and tell me to move a train from one station to another, without my receiving an order from that train dispatcher, I surely would not go. I would obey the train dispatcher over anybody. The train dispatcher on duty has the sole control of the trains he handles.

Cross-examination:

Q. If the trick dispatcher has control of the train, where does the chief dispatcher come in?

A. The chief dispatcher superintends the working of the dispatcher's office over all the division. The jurisdiction of the chief dispatcher extends farther than the division of the trick
71 dispatcher. Where there are six trick dispatchers working under a chief dispatcher the jurisdiction of the chief dispatcher extends over two divisions. They all work in the same office. The trick dispatchers are subordinate to and under the surveillance and guidance of the chief dispatcher, and in case any question arises the chief dispatcher's direction controls.

There was evidence produced and admitted on behalf of plaintiff tending to show that by reason of the collision above mentioned the plaintiff was thrown from the cab of the engine upon which he was employed at the time of said collision, to the ground, and by reason thereof and of said collision sustained serious and permanent injuries in his person.

Hereupon plaintiff rested his case.

Thereupon defendant by its counsel moved said Court for a judgment of nonsuit and in that behalf filed its written motion in words and figures as follows:

[Title of Court and Cause.]

*Motion for Nonsuit.*

Comes now the defendant in the above-entitled action and moves the Court now here for a judgment of nonsuit and that this action be dismissed and that it recover its costs herein, on the grounds and for the reasons following, to wit:

1. That the evidence of the plaintiff fails to establish any cause of action against the defendant.

72 2. That the evidence of the plaintiff discloses that the plaintiff was injured by the negligence of his fellow-servants or coemployees.

T. J. NORTON AND
U. T. CLOTFELTER,
*Attorneys for Defendant.*

Said Court, both said parties by their respective counsel consenting thereto, reserved its ruling upon said motion for nonsuit until after the close of the evidence on both sides and the argument and submission of the cause for decision.

J. R. WILLIAMS was called and sworn as a witness on behalf of defendant and testified as follows:

On November 20, 1901, I was a locomotive engineer in the employ of the defendant company and was in charge as engineer of train No. 3 on the defendant's railroad running from Kingman to Needles on that day. I had been in the employ of the Santa Fe Company for thirteen years prior to that time—for two or three years as locomotive engineer and during the balance of the time locomotive fireman. I learned the trade and business in the employment of the defendant company. I remember the collision between trains Nos. 3 and 4 near Franconia on that day. I had orders for the running of train No. 3 on that day. They were delivered to me at Kingman, Arizona. There was only one locomotive on that train and I was the only engineer. I have those orders with me now.

73 The witness then produced a certain document purporting to be a train order, No.17, dated Trainmaster's office, November 20, 1901, and addressed to the conductor and engineer of train No. 3 at Kingman, and testified as follows, concerning the same:

That is a train order received by me at Kingman on November 20, 1901, for the running of train No 3.

Thereupon said document was offered and received in evidence and marked Defendant's Exhibit No. 1. The following is a full and true copy of said Defendant's Exhibit No. 1:

DEFENDANT'S EXHIBIT No. 1.

(Form 31 Standard)
The A. T. & S. F. Ry. Co.
Santa Fe Pac. R. R. Co.
Sou. Cal. Ry. Co.
C. C. & S. F. Ry. Co.
The S. K. Ry. Co. of Tex.
The S. F. & S. & V. Ry. Co.
SANTA FE ROUTE.
Telegraphic Train Order No. 17.
Trainmaster's Office, Nov. 20, 1901.

Form 31 Form 31

For Kingman to C. & E. No. 3.

No. 3 Eng. 482 will run 1 hour & 40 mins. late Kingman to Needles.
J. D.

74 Conductor and Engineman must each have a copy of this form.

| Time received | | O. | Given at | Received by |
|---|---|---|---|---|
| 3:21 | | | 3:2— A. M. | |
| Conductor | Train | Made | at | |
| Higgins | 3 | Comp. | 4:20 A | Byrum. |

The witness thereupon produced a document purporting to be Train Order No. 22 dated Trainmaster's office, November 20, 1901, addressed to the conductor and engineer of train No. 3 at Kingman, and testified as follows concerning the same:

That is one of the orders received by me at Kingman on the date last mentioned for the running of train No. 3.

Whereupon said last mentioned document was offered and received in evidence and marked Defendant's Exhibit No. 2; the following is a full and true copy of said Defendant's Exhibit No. 2:

DEFENDANT'S EXHIBIT No. 2.

(Form 31 Standard.)
The A. T. & S. F. Ry. Co.
Santa Fe Pac. R. R. Co.
Sou. Cal. Ry. Co.
G. C. & S. F. Ry. Co.
The S. K. Ry. Co. of Tex.
The S. F. & S. & V. Ry. Co.
SANTA FE ROUTE.
Telegraphic Train Order No. 22.
Trainmaster's office, Nov. 20, 1901.

75 Form 31 Form 31

For Kingman to C. & E. No. 3.

No. 3 eng 482 has right of track over No. 4 eng 444 & 450 to Needles but will run 1 one hour & 50 mins late Kingman to Needles. J. D.

Conductor and Engineman must each have a copy of this form.

| Time Received 4:12 A. M. | | O. K. given at 4:13 A. M. | | |
|---|---|---|---|---|
| Conductor | Train | Made | At | Received by |
| Higgins | 3 | Comp. | 4:20 A. M. | Byrum |

The witness thereupon produced a third document purporting to be Train Order No. 23, dated November 20, 1901, and addressed to the conductor and engineer of train No. 3 at Kingman and testified that he received said order for running train No. 3.

Said last-mentioned document was thereupon offered and received in evidence and marked Defendant's Exhibit No. 3, and the following is a full and true copy of said Defendant's Exhibit No. 3.

DEFENDANT'S EXHIBIT No. 3.

(Form 31 Standard.)
The A. T. & S. F. Ry. Co.
Sante Fe Pac. R. R. Co.
So. Cal. Ry. Co.
G. C. & S. F. Ry. Co.
The S. K. Ry. Co. of Tex.
The S. F. & S. & V. Ry. Co.

76 SANTA FE ROUTE.

Telegraphic Train Order No. 23.

Trainmaster's office, Nov. 20, 190.—

Form 31 Form 31

For Kingman to C. & E. No. 3.

No. 3 eng 482 will run two (2) hours late Kingman to Needles.

J. D.

Conductor and Engineman must each have copy of this Form.

Time Received 4:21 A. M. O. K. given at 4:22 A. M.

| Conductor | Train | Made | At | Received by |
|---|---|---|---|---|
| Higgins | 3 | Comp. | 4:22 A. | Byrum |

Assuming that copies of those orders giving No. 3 the right of track and directing that it be run two hours late were delivered to train No. 4, I would say as an experienced railroad man and engineer that those orders were sufficient and proper for the safe handling of trains Nos. 3 and 4 with respect to each other. I read those orders before leaving Kingman and understood them. They were read to me by the conductor and I read them to the fireman and I thoroughly understood the orders. There were five cars in our train. I had been running on these limited trains for quite a while. I had been running on this division from February to November. I had a time-card that morning of the collision. I was carrying a watch. I compared the time and registered my watch at Seligman and compared time with the conductor before we left.

77 Cross-examination:

I have not worked for the defendant since November 20, 1901. There are no existing business relations between me and the defendant at the present time. I was hurt in the wreck. I have not settled with the defendant in any shape nor received any benefit from it. I have not received any payment or promise of payment from defendant.

Redirect examination:

I passed Yucca on the morning of this collision two hours late.

Recross-examination:

I passed Yucca on this morning between 4:57 and 4:58. I passed Franconia between 5:17 and 5:18. It is hard to tell the time when the collision occurred. It was only a very few minutes after I left Franconia because I was running pretty fast after leaving there. Did not stop at Franconia; slowed up for the curve coming into that place. It was only about two minutes after I left Franconia before we collided with No. 4. I did not notice the time of the collision. I should judge the collision occurred between 5:19 and 5:20. If No. 4 had been on time I would have met her further up the road. I was not looking out for No. 4. She would have been further up the road if she had been on her schedule time. If No. 4 had been running on her schedule time I would have met her at Haviland. I looked at my watch at the whistling-post at Franconia. Byron Gold-
78 smith was the fireman on my engine. He is dead. I looked at my watch at the whistling-post at Yucca. There was no one else on the engine besides Goldsmith and myself. I did not stop at Yucca. I slowed up. Also slowed up at Haviland. We always slow up coming into Franconia. We were going about forty miles an hour when we passed Franconia. That was after we slowed up. We had been running about forty-five miles an hour. For a part of the way between Haviland and the point of the wreck we were traveling at from sixty to seventy miles an hour.

Q. Which part of the way?

A. Until I came so close to the big curve. I slowed my train down there. I resigned from the employ of the defendant. It was not a forced resignation. I did not feel like railroading any more and I went into a business of my own. I was not able to run an engine after the wreck on account of my injuries.

J. E. BUTLER was called and sworn as a witness on behalf of defendant and testified as follows:

I am the chief dispatcher for the Santa Fe at San Bernardino. On November 20, 1901, I was the chief dispatcher for the defendant company at Needles, California. I had charge of the trick dispatchers. I had six trick dispatchers under me at that time. I had a night assistant chief dispatcher. There was a chief dispatcher on duty continuously night and day. There was at all times a chief dispatcher supervising the work of the trick dispatchers. My
79 hours of duty were from 7 A. M., the night chief dispatcher from 7 P. M. to 7 A. M. The chief dispatcher was within call during his hours of duty. The trick dispatchers reported to us directly and we had charge of their work. We supervised their work and saw that they were properly handling the trains in regard to their movements; seeing that no trains were delayed and giving advice about making meeting points and advice about anything connected with the handling of the trains that they did not understand when asked by them for information. Their calls upon the chief dispatcher for information were quite frequent—made at every hour of the day. Some mention was made in regard to the right of trains very frequently. That is common in the offices of chief dispatchers of railroad companies. I knew E. L. Moore, one of the trick dis-

patchers at the time of the Franconia wreck. He was one of my subordinates acting under my supervision and direction. The time is given to the telegraph offices along the line of defendant's railroad every morning at 8 o'clock. Washington time through repeaters from St. Louis is given on through repeaters clear to the coast. It is Washington time but we repeat through St. Louis. This time is given to every telegraph office on the line of defendant's road every day. It is communicated to them by telegraph. I have had a number of years experience as a trick dispatcher and have kept what is called the train sheet in handling trains. The witness was shown Plaintiff's Exhibit No. 5 and testified concerning the same as follows:

80 That is the train record or train sheet that was used at the Needles office Friday, November 20, 1901. I am familiar with all three of the handwritings upon that sheet. That sheet was used by Dispatcher E. L. Moore from midnight until 8 A. M. and then used by Mr. Starkweather from 8 A. M. to 4 P. M. and then used by Mr. Hoover from 4 P. M. until midnight. I can tell that by the handwriting on the document. This sheet is a record of the time and the work.

By DEFENDANT'S COUNSEL:

Q. I will call your attention to the entry on this sheet in the first blue column to the left of the printed word "Yucca" under the heading "3 Higgins, J. R. Williams," where there is a figure 5 with a figure 7 written over it, and ask whether you can tell how that alteration may have been made.

COUNSEL FOR PLAINTIFF: That is objected to upon the ground that that is not evidence how it may have been made. That is drawing of inferences. He cannot speak without knowledge. He can speak of his knowledge, or, if he is an expert, he can speak of opinion. These are the only two kinds of evidence.

The COURT: Is there anything about this train sheet of such a character that he can speak from the standpoint of an expert by virtue of his experience?

COUNSEL FOR DEFENDANT: I had better show his qualifications in that direction.

81 By COUNSEL FOR DEFENDANT:

Q. Mr. Butler, in your practice as a trick dispatcher and as a chief dispatcher state whether or not alterations such as I have indicated to you occur on train sheets used in the movement of trains?

A. Yes, they occur daily.

By COUNSEL FOR DEFENDANT:

Q. You may state how they occur.

A. Well, an operator might O. S. a train—that is reporting a train by his station—he might say, for instance, "No. 7 by 3:35." Well, the dispatcher, when he said O. S.—that means train report—he would take his pen and he would write down 3:35, and a second after he put it down—that train might have been due there, might

have passed there at 2:35—he would say to the operator: "Did you say 3:35 or 2:35?" He says, "I made it 3:25—make it 2:25, a mistake." He might show 34 arrived at 10:35 and left at 11:10 and in ten or fifteen minutes he might call up and say, "No. 34 is not out; it has stopped at the switch," after once having reported and the dispatcher had put it down on the train report. He would say "They have stopped at the east switch." The dispatcher would say, "Go and see what is the matter"—"Well, they have broke in two." They would leave at 11:40 then. Then in leaving the station he would give a proper O. S. report.

The witness, continuing, said: I do not know the origin or significance of the signal O. S. It is a signal the operator gives the dispatcher when he gives the time of a train. These situations that I have spoken of as causing alterations in the train sheet occur frequently daily. They happen every day. In my experience
82 as a dispatcher I have occasion in the handling of trains to inquire of telegraph operators along the line about the time they are carrying in their offices. When an operator reports a train at a certain time and the time is not what the dispatcher thinks it ought to be he would inquire of the operator, "How long have they been gone?" and the operator might reply, "They have been gone about two or three minutes," and the dispatcher inquire, "What time have you now?" and he would say I have a certain time and the dispatcher then say, "You are so many minutes off; you are a minute off; you are two minutes off; you are three minutes off." The operator would then give the correct time the train left, and the dispatcher would alter his memorandum on the train sheet. There are other alterations upon this same train sheet of the same character as the one to which my attention has been called. Here is one made on that train sheet by Dispatcher Starkweather: "2d—No. 2 Conductor Gibson—by Drake 4:26"—a change was made there. One entry has been made over another. I am not able to decipher the orignal number. The 4 was placed over a 3, but I cannot tell what was written underneath the 2 or the 6. Here is another alteration on this same train sheet made by Dispatcher Starkweather with reference to an eastbound train at Peach Springs; 11:55 is written instead of 12:55. There was a change of an hour there. There appears to be another alteration on this train sheet made by Dispatcher Starkweather with reference to No. 7 out of Seligman. It
83 seems that a 2 has been written over a 1. There is another alteration on this train sheet made by Dispatcher Moore in a column headed "Reedy" as to the time of the departure of the train from Seligman. It is marked 1:34 A. M. I am not able to tell what was written underneath that. There is also another alteration made on this sheet by Dispatcher Moore for the time of a train at Kingman is shown on the sheet as 2:40. It was originally written 2:30 and a 4 marked over the 3. There was a change of ten minutes. This train sheet shows that train No. 4 left Needles at 4:22 and arrived at Mellen at 5:45 and left there at 5:47. The running time for that train from Needles to Mellen was only twenty-five minutes. When No. 4 was running according to the time card schedule it would leave Needles

at 4 o'clock and arrive at Mellen at 4:25. That train leaving Needles at 4:22 ought to have arrived at Mellen at 4:47. The entry on the train sheet showing that that train arrived at Mellen at 5:45 and left at 5:47 was a mistake on the part of the operator in giving the time of arrival and departure of the train at Mellen. According to my experience the train dispatcher would not be misled by such a mistake, for the reason that the dispatcher when he made the entry on the train sheet, acting merely as a machine and by force of habit in noting down the time given him by the operator, perhaps did not notice the time given until after he had written it down, but as soon as his attention was attracted to the entry he would know independently of the train sheet that the operator at Mellen had made
84 a mistake of an hour. The dispatcher knew the location of that train. He knew that she was only twenty-two minutes late leaving Needles according to the time sheet. In describing the movement of trains the dispatcher is guided by the working time-card and his order-book and the location of trains as shown by the memoranda on the train sheet. He moves his trains by his time-card and his order-book and he keeps a memorandum of the movement of the trains as the operators along the road tell him when trains pass. He makes these memoranda on his train sheet. He knows what trains are going east and what are going west. The order-book is the official record of the orders given by train dispatchers. It is the only book in which we carry any signatures. Every order issued is entered and preserved in this book. This train sheet is a memorandum made by the dispatcher of the reports sent him from the different telegraph offices along his division of the road of the times trains pass those stations. The dispatchers in making the entries upon the train sheets have no personal knowledge of the truth of the entries. The entries are made according to the information communicated by the operators along the line.

Cross-examination:

I have been in the employ of the defendant company about seventeen years, all of that time in the telegraph department, excepting four years. From 1890 to 1894 I was in the office of the superintendent of transportation. I am now chief dispatcher of the
85 division office at San Bernardino. I was transferred from Needles to San Bernardino on March 15 last. I was chief dispatcher at Needles for about two years. I knew Dispatcher Moore very well. He was a competent dispatcher and was a man of steady habits up to the time he left the employ of the defendant. He was a man of steady and sober habits on the 20th of November, 1901. I never saw any indication of his using intoxicating liquors up to the time of the Franconia wreck. The entry on this train sheet, Plaintiff's Exhibit No. 5, under the heading "Passenger Delays," which reads as follows: "No 3 Seligman 5 minutes—Conductor Higgins refused an order because engine number not shown. He did not know what engine he had, neither did the operator," means that before No. 3 reached Seligman the roundhouse had not advised the

operator at Seligman what engine would be turned out to handle No. 3 from Seligman, and the dispatcher on duty had to put out some order in regard to No. 3 and left the engine number blank and when No. 3 arrived Higgins wanted the engine number shown in the order. He refused to take the order until the engine number was entered. Where an order such as was given to train No. 3 upon this occasion giving it the right of track and directing it to run one hour and forty minutes late is issued, or an order is subsequently issued directing that train to run two hours late, no entry or memorandum relating to either of such orders would be made upon the train sheet. Such orders are entered in the order-book. The dispatcher works with the train sheet and the
86 order-book before him, and when the dispatcher is wired by the local or station operators of the time of arrival or departure of trains, no report or entry of those dispatches is made except on the train sheet. He makes an entry of the time given on the face of the train sheet in the proper column and opposite the name of the station with reference to which the time is given. The entries upon the train sheet are the only written memoranda the dispatcher makes of the messages sent him by local or station operators regarding the movements of trains. The local or station operators at stations other than register stations make a memorandum of the time of arrival and departure of trains on a scratch pad. Needles was a register station. The dispatcher's office did not make any report to the superintendent's office of the O. S. as made by the local or station operators. The time is telegraphed over a through wire which is cut into all the stations along the line. The time is communicated to all the stations at the same instant. Every operator along the line was supposed to hear the tiem as it was sent over this wire. This process of communicating the correct time to these stations took place at 8 o'clock in the morning of each day. We had standard time clocks at these telegraph stations. By a standard clock I mean one that will keep good time and is marked daily when the time is given. If such a clock is three seconds slow a small card is placed in a case under the dial, this card reading, "This clock is three seconds slow." If the clock
87 is three seconds fast we place another card in the case which would read, "This clock is three seconds fast." There is a card showing where the standard clocks are kept, and conductors and engineers compare time at these standard clocks which are corrected every day. There were standard clocks at Seligman, Needles, Bagdad, Barstow and Mojave. A standard clock was not kept at either Yucca, Franconia or Mellen. There were clocks kept at those stations but not standard clocks. I am quite sure the company supplied the clock for Yucca. Almost all the agents' offices have been supplied with clocks. I cannot say positively whether the clock at Yucca was supplied by the company or whether it belonged to the operator. I do not think that the operator at Franconia had a company clock. I think the operator at Mellen had a company clock. The operators at all of these stations, those not having standard clocks as well as those that had, were supposed to take the correct time from the wire each morning at 8 o'clock. Where there were two

limited passenger trains running under the orders and conditions that trains Nos. 3 and 4 were on the 20th of November, 1901—that is, train No. 3 having the right of track and under orders to run two hours late and No. 4 running in the opposite direction about twenty minutes behind its regular time according to the time-card schedule—and there was no order given specifying the meeting point for the trains, train No. 4 would have the right to run as far as she could proceed and clear the track without interfering with the running time of No. 3 as fixed by the time-card and modified by the order requir-
88 ing No. 3 to run two hours late. The meeting point for the trains would be fixed or selected in that manner. The practice in respect to an inferior train meeting and clearing the track for a superior train under such conditions on the railroad of the defendant was in accordance with the rules and regulations. There was no practice contrary to those rules and regulations and no variance from the rules and regulations. Moore's hours of duty as trick dispatcher at Needles were from 12 o'clock midnight to 8 o'clock in the morning. Whenever a question arises as to the location on the line of a particular train at a particular time the dispatcher refers at once to his train sheet, the memorandum on his train sheet of the last report O. S. he had of the train. My impression is that the entries on this train sheet of the time and arrival and departure of train No. 4 at Mellen were made about the time the train passed there. Of course, the operator at Mellen must have reported those times before the entry was made. It is my opinion that the operator at Mellen reported the train by at 5:45 instead of 4:45, and I think the dispatcher put it down automatically and before he noted what he was putting down on the sheet. Possibly the operator reported the time correctly and the dispatcher made a mistake in making an entry of the report. It was a mistake made either by the operator or the dispatcher. In my opinion the mistake was made by the operator. There is such a dissimilarity between the combination of telegraphic signals which stand for the figure 4 and those which stand for the figure 5 that I do not think it possible
89 that the dispatcher could have made the mistake in reading the signals as they were sent over the wire. The telegraphic signal expressing the figure 5 is a combination of dashes—three dashes, and the signal expressing the figure 4 is a combination of four dots and a dash. We are governed by sound entirely in telegraphing. The use of script has been discarded entirely. I think that this mistake would naturally be with the operator and not with the dispatcher. It is true that the dispatcher has to depend entirely upon sound. I can not give any other reason for my opinion that this mistake was made by the operator. When both of these trains, No. 3 and 4, were running on the reguler schedule as fixed by the time-card, No. 4 eastbound had the right of track. The right of track was reversed on this occasion and given to train No. 3 because both trains were late and because No. 3, being out of her terminal, Kingman, and her equipment being in good order, she could be safely counted upon to make her schedule running time. When the order was made reversing the right of track train No. 4 was not yet

on the division; she was still west of the Needles. She had to come into Needles, change engines, an inspection of the brakes had to be made, and her brake equipment repaired if out of order. The dispatcher had no assurance when that train would get out of Needles until the car repairers were through. There might have been four or five brake shoes to put on after coming down the mountains. Train No. 3 had passed the last inspection point on her run and the dispatcher knew that No. 3 would make her schedule running
90 time. These are the reasons why the right of track was reversed. If train No. 4 had been on that division at the time the order reversing the right of track was made, No. 4 would have been the superior train and the order reversing the right of track would not have been made, because the dispatcher would have known that No. 4 had passed by the last inspection point and that her equipment was in good order and that she would go over the division all right. There was no necessity for making a meeting order. The dispatcher would not want to make an order fixing a meeting point when he had given No. 3 the right of track. He would let train No. 4 go where she could and make her own meeting point according to the order she was working under and according to the schedule and book of rules. It was not necessary for train No. 3 to keep a lookout for or know anything about the location of train No. 4. Train No. 3 had the right of track over No. 4. It was the duty of train No. 4 to give No. 3 a clear track. All that No 3 was required to do was to obey orders and run two hours late with reference to the regular time table schedule. Train No. 3 was bound to run according to the schedule prescribed by the regular time table as modified by the special order requiring her to run two hours late. It was her duty not to run less than two hours late with reference to her schedule as prescribed in the regular time table. She was not allowed to make up one second of that two hours as long as that order was in effect.
Upon this regular time-table and the order requiring No. 3 to
91 run two hours late there could be no question whatever about the time No. 3 was due at Franconia; she was due there at 5:17. The local station operators on that division were on duty twelve hours each day and the shifts were from 7 A. M. to 7 P. M. and 7 P. M. to 7 A. M. There were two operators, one for the night and one for the day. I think there were two operators at Mellen in November, 1901. I think there were two operators, one for the night and one for the day at Franconia at that time. I think that is true for the reason that I find on this train sheet, Plaintiff's Exhibit No. 5, that every train that passed Franconia both day and night is reported on the sheet. There are electric bells at some of those stations where only one operator is employed, by which the operator when asleep or off duty is called when anything is wanted. The sleep of the men at such places is not disturbed more than one hour. They get plenty of sleep. There was a night and a day operator employed at Yucca station at that time.

JOHN DENAIR was recalled as a witness on behalf of defendant and testified as follows:

Both Conductor Higgins and Engineer Williams of train No. 3,

were put through a regular examination as to competency and capability before they entered the service of the defendant company. They were both considered competent men according to the rules. Mr. McEligot, engineer on the lead engine on train No. 4 was considered a competent and first-class man. Holmes, the engineer on the second engine on that train, was considered a good en-
92 gineer. Morse, the conductor on train No. 4 had been in the service a long time. McEligot had been in the service about five or six years. He was a man of exceedingly good and temperate habits. Train Dispatcher Moore, when he came to us, was very highly recommended in the east. He was recommended by Mr. Cowans, who was superintendent of transportation at Topeka. Cowans was superintendent of transportation for a portion of the Santa Fe system. I think Dispatcher Moore had been in the service for quite a number of years. He came to us from what is known as the Texas lines—the Texas lines of the Santa Fe system. Operator Byrum at Kingman passed the regular examination. He has always been considered a first-class operator. He was regarded as a competent and capable man. Operator Finnigan came to us from Wisconsin. I do not know just how long he had been with us. He is still in the service and a thoroughly competent man. He also passed the examination. Kendrick, who was the operator at Yucca, is a good operator and is still in the service. He had been in the service for several months, perhaps more than a year prior to this wreck. The equipment of these trains No. 3 and 4, at the time of this wreck, was what is known as vestibule equipment, the best equipment there is for passenger service. The engines were of the Baldwin pattern and were first-class. Both engines on train No. 4 were Baldwins. En-
93 gine No. 482 was a Rhode Island and was a first-class engine perhaps a couple of years old. Train No. 3 consisted of a buffet-car, diner and three Pullman sleepers. It was all high grade equipment. Train No. 4 consisted of two locomotives, a buffet, a diner, three Pullman sleepers and two locomotives. All of the equipment was first class. The track was in first-class condition and has been very highly spoken of from time to time on account of its good condition. I was in the train service myself for about seventeen years as a conductor and brakeman. From my experience in the train service and as a superintendent it is my opinion that the orders issued to trains Nos. 3 and 4 on the night of the accident in question were proper and safe orders when taken in connection with the time card for the handling of those two trains. W. J. Connors was the day operator and Kendrick the night operator at Yucca on the day of the wreck.

Cross-examination:

Smith was the telegraph operator at Franconia in November, 1901. Franconia was a night office only at that time. I think the office hours were from 7 P. M. to 7 A. M. It was not an open telegraph office during the daytime. At some of these stations where we have only one operator the operators sleep in the telegraph offices and they are called by an electric bell when required during the hours they are

off duty. At such stations the operator is required to answer
94 the bell whether during regular office hours or not. I would not consider that a twenty-four hours' shift. You can go to bed and set your alarm clock to wake you up at 5 o'clock. You would not consider that you stayed awake waiting for the alarm clock to go off. The bell keeps ringing until a call is answered. These calls by the electric bells are very infrequent. I know that the rules and regulations do not provide for the giving of a special meeting order to trains running under such orders as were given to trains No. 3 and 4 on the night of the wreck. Such orders as were given to these trains on that occasion are presumably used on ninety per cent. of the railroads in the United States.

Q. Now, I call your attention to Form "A" of train orders, the very first one set forth in your book of rules, page 31, Form "A," fixing the meeting of opposing trains: "Blank and Blank will meet at Blank." Why wouldn't that have prevented this wreck? Why wouldn't such an order as that have prevented this wreck?

A. That is a question. There are wrecks where they don't have any orders.

Q. I am asking you the question.

A. I don't think it would be any more likely to prevent the wreck than the order they have had. That is my opinion of it, and I don't believe it would.

A. Assuming now that it is the duty of the company to form some kind of a plan by which trains can pass on a single track,
95 say that is the duty of the company, do you desire to be understood that the getting of the trains past each other was left to those two conductors under these orders that are given in this case?

A. The orders; they have their time-cards to run on, just the same as if the orders told them how much late they would run on their time-card rights. Conductor Morse, on train No. 4 was the man to select the passing point. He was the man, to use a railroad phrase, to get into the clear and out of No. 3's way. He was the man to select a place that he could reach with safety. He was furnished with the time-table, the special orders, the general rule and the train and told practically to exercise his judgment as to where he would meet train No. 3.

By Counsel for Plaintiff:

Q. How much time does it take to start a train such as that; that is to say to get it under headway of twenty-five or thirty miles an hour?

A. Well, that is a question that there is no man that knows enough of experience to answer. You would have to be on the train on every occasion to see how the brakes are released, how the engine works. There is no man who has had any years of experience can tell just how many seconds or minutes it would take to start a train of six, eight or ten cars and get them under headway of thirty, forty or fifty miles an hour, because the conditions are
96 different with every train.

Q. Now, when you come down to a question of cold calcu-

lation like that, can you say that it is a reasonable method and a proper method of running first-class limited trains?

A. Yes, sir.

Q. Where you have got a hundred lives on each train, leaving it to be calculated by the conductor of either train as to whether he is making a half minute or half a minute more or less?

A. Yes, sir.

Q. You think that is safe, do you?

A. Yes, sir.

Q. You think it is prudent?

A. I think it is prudent.

Q. Now, tell us why, after your dispatcher had on his time-table here—not his time-table, but on his train sheet—he had both these trains located, they had been O. S'd to him—Train No. 4 had been O. S'd at Mellen at 4:45 arriving, and 4:47 leaving; assuming there is a mistake of an hour there; and the other train had been O. S'd at Yucca or had been O. S'd at some station beyond Yucca, and if these trainmen from that time on could figure where they would likely meet, why couldn't it have been made a certainty by the train dispatcher, so that neither one of those trains would have lost more than three to five minutes by fixing in a definite train order a meeting point?

A. Because it would have delayed both trains to have
97 done so, and the order if it had been properly executed as it was put out was just as safe as to make a meeting order.

Q. Now, then, if you say it is just as safe, let me ask you now, how you account for that collision, and death of these men; just tell us how you account for it, if you say it is certain?

A. Well, I cannot account for it more than other accidents.

Q. You call it an inevitable accident?

A. Which occur from time to time?

Q. You mean to say you have no more definite idea of it than that?

A. Well, I don't know. As far as the orders covering the running of trains are concerned, I don't see how it could have been handled more safely than it was.

Q. Are we to understand you, Mr. Denair, to state that railroading—the science of operating railroad trains—has progressed and advanced no farther than that the happening of such a lamentable event as the collision of these two trains should be allowed to take place, and be an illustration of good railroading?

A. Why, I don't think that it is good railroading if there is anything faulty in equipment or in the servants that are put in charge of the train, and they get together. If the track is in bad order or they get off—but if you start a man out and give
98 him a good machine and good tools to work with, and unfortunately he falls down, I don't think the railroad company or any of its representatives are to blame for the accident.

Q. Well, now, I propound to you what is a similar question to the one I asked a while ago, as to whether, with the facilities which this company had of telegraph stations and telegraph operators and

advices which they had come to it, of the location of these trains wouldn't it have been a matter of common prudence to have sent a special meeting order after you got notice of where these respective trains were, so as to obviate this thing of one man's watch being a little too fast or another man's watch being a little too slow, in an instance where a minute or a half a minute meant the lives of a hundred people?

A. No, sir, that is a question that has been asked over for ten years; if a train has orders and if they had thought it would be better to make positive meeting orders, they would have adopted them years ago.

Q. Now, as a matter of fact, there are printed rules which cover—and printed forms given you which cover the matter of the orders in your own rules, and they are in evidence in this case?

A. There are orders.

Q. That is, when you are a mind to use them?

A. Yes, sir.

Q. Now, wouldn't a meeting order, after you knew where these two trains was—wouldn't a meeting order have prevented this accident?

A. No, sir.

99 Q. If a meeting order, such as this: "Trains No. 3 and No. 4 will meet at Franconia," had been sent out after the train dispatcher knew that No. 4 had arrived at Mellen and No. 3 had arrived at or had passed the next telegraph station beyond Yucca, wouldn't that have fixed a definite, certain, absolute meeting point for those trains to meet at, and wouldn't that have eliminated the matter of calculation on the part of Conductor Morse?

A. It would have fixed a meeting point at Franconia, or wherever the orders were made.

Q. If a definite order had been given to meet, and that order had arrived at Franconia before either No. 3 or No. 4 had arrived there, would not that operator have put out the board against the first one, or either of these trains coming through, if he had had such an order as that?

A. The board is out at all times. The train comes in sight and clears them.

Q. If the board had been out upon a stop order—even a non-communicated meeting order is a stop order, isn't it?

A. The board is always a stop order.

Q. Now, then, of such an order as that had been issued and been given to the operator at Franconia, he would have stopped No. 3 or No. 4, would he not, by putting the board against them?

A. He would have done his part. I can't tell you whether

100 he would have stopped No. 3 or 4, because I have told you there have been many collisions where they have had strict meeting orders as by running the other way.

Q. You think the only way to stop it would be to put a tie on the track or set the derailing switch?

A. If they had taken up a rail, it would have stopped them.

Q. What I am trying to get at, Mr. Denair, is, under ordinary

circumstances, if a meeting order had been given to the operator at Franconia, after the dispatcher knew where these two trains were, in all human probability, wouldn't that have prevented this accident—this collision, which did occur?

A. Well, I think I have answered that question. It might have prevented this particular accident, but I consider the other order just as safe if that is what you are trying to get at.

Q. What is there in railroading that renders it obnoxious to give meeting orders? Do you lose time of trains by them?

A. You lose time, and on certain parts of all divisions of railroads where trains go in one direction, especially in the mountain roads in this country, they are almost sure to make time. In the opposite direction they are not so sure on account of heavy trains and adverse winds and sand, and it is a custom for dispatchers to give the train which they are pretty sure is going to make
101 time, to reverse the rights occasionally; that is, eastbound trains or even numbered trains have the right to the track unless the rights are reversed by such an order as No. 3 and No. 4 had on this occasion.

Q. Now, possibly that is an answer to my question, but it does not occur to me it is. Is there any reason that you can assign except the loss of time by giving special meeting orders?

A. Well, there are sometimes. Sometimes it helps out a great many other trains. If you get a superior class train going over a division, you get it two, three or one hour late, and you know the very best you can do is to make the schedule time; and it may help out a great many trains on the division by running her just that much late, and the other trains will have a copy of the order, and they know just what to do.

Q. How long is the sidetrack at Powell station?

A. Two thousand five hundred feet long.

Q. The station board midway of the length of it?

A. Close to midway, yes, sir.

Redirect examination:

The meeting orders provided for by the rules are at one time or another issued to all classes of trains. We sometimes issue such meeting order to trains Nos. 3 and 4. The order provided for in Form "C," giving a train of inferior right the right of track over an opposing train of superior right is employed by all
102 roads which use the standard code, and that is about ninety per cent of the mileage in the United States. In my experience as a railroad man it has come within my knowledge that more men have disregarded positive meeting orders prescribed by time-cards or special orders than have disregarded orders such as were issued in this present instance. I have known railroad men on a great many occasions to disregard positive visible signals respecting the movement of their trains. It is one of the objects in railroading to cover the greatest distance in the least time, and to keep in motion the largest number of trains on a division. A system that does not accomplish this is not considered as a good system. There

was no telegraph office at Powell; that is what is known as a blind siding. Sometimes such a siding is made a meeting point for opposing trains, but never where it can be avoided. I think the reasons for changing the right of track in this instance were that train No. 3 was more behind time than No. 4, and No. 3's run was downgrade and she was more likely to make her schedule time than No. 4. From my experience I should say that the operator at one of these stations where we have a call-bell would not be called on an average more than ten times a month.

Recross-examination:

Q. (By Counsel for Plaintiff.) Now, Mr. Denair, you were asked by Mr. Norton as to whether fixed meeting orders or orders
Form "A" fixing a meeting point for opposing trains were
103 applicable to only extra trains or those not upon the table, or whether it applied to any train. What do we understand your answer?

A. We use them for all trains. We use both forms of orders.

Q. Now, assuming that train No. 4 was reported to the train dispatcher at 4:45 train No. 3 was reported at Yucca at 4:58, and the one at Mellen at 4:45-47; the one at Yucca at 4:55 to 4:58; then wouldn't that situation, having telegraph station at Franconia in between them—would it not fall within terms the rule 271 reading as follows: "Meeting orders must not be sent for delivery to trains at the meeting point if it can be avoided. When it cannot be avoided, special precautions must be taken by the train dispatchers and operators. There should be at least one telegraph office between which opposing trains receive meeting orders"?

A. Yes, there was neither one of these trains had meeting orders.

Q. Well, why couldn't they have been given meeting orders at Mellen and others at Yucca?

A. Well, there was no necessity of delaying the trains to change the orders.

Q. It was then known just where the two trains were though?

A. It must have been.

Q. And the train dispatcher knew the grades and the distances
and the times it took, and as it worked out they met by the
104 attraction of gravitation where they did meet. Now, I am asking you, as a railroad experienced expert, as to whether that don't show a demonstration that Franconia would have been a good place to stop those two trains?

A. Yes, sir. It was a good place for the conductor to make under the order he had, and he was just as safe as if he had a special meeting order.

Q. But, through somebody's mistake, they failed to carry it out?

A. Yes, sir. Just the same as everybody does sometimes.

J. H. Byrum was called and sworn as a witness on behalf of defendant, and testified as follows:

I was the telegraph operator at Kingman, Arizona, on November 20, 1901. I received from the dispatcher at Needles a train order No. 23, on the morning of that day. I received three orders for train No. 3 at Kingman that morning. These orders, Defendant's

Exhibits, Nos. 1, 2 and 3 are the three orders I received at Kingman for train No. 3. I delivered two copies of each order to Conductor Higgins and kept one on file in the office for the office record. I did not read the orders to Higgins. I do not remember whether or not he read them to me. That is the rule of the company. The signature of Conductor Higgins appears on each of these orders. These orders are what are known as standard orders in railroad service. I have worked as a trick train dispatcher I have
105 worked as a dispatcher's operator. I worked as a dispatcher's operator, or copyist, at Fairbury, Nebraska, for the Rock Island, and at Sedalia, Missouri, for the Missouri Pacific. Those roads were operated under the standard rules—standard code 31 and 19 orders. I think that all railroads use the same rules. I do not know that each company cuts out such of the standard rules as it does not care to comply with.

The witness was shown Plaintiff's Exhibit No. 1, and he testified as follows concerning the same:

I do not know whether this code of rules contains standard rule 418. I do not remember the rules by numbers. I did not have any experience as a train dispatcher's operator on any part of the Santa Fe system on or about November 21, 1901. I remained on duty at Kingman after train No. 3 had proceeded toward Needles. I heard from train No. 3 after it left Kingman. I heard the conversation between the dispatcher and the operator at Yucca, and also heard the conversation between the dispatcher and the operator at Franconia. I do not know as I can give the conversation between the dispatcher and the operator at Yucca word for word, but I remember hearing it. I remember hearing the dispatcher asking something about his time. The operator gave the dispatcher his correct time, the time he had at that time, and the dispatcher told him that his clock was two minutes slow, as I remember it. That is all the conversation I heard between those two.

Cross-examination:

It must have been about 5 o'clock that I heard this conversation between the operator at Yucca and the train dispatcher. I
106 fixed that time in this manner: No. 3 left Kingman that morning at 4:31, and it is about a thirty-minute run between Kingman and Yucca, and of course this accident happened after 5 o'clock. I could very easily remember the time. I heard the operator at Franconia report to the train dispatcher that train No. 3 passed at 5:11. I then heard the dispatcher then say something about "They are gone" or "Are they gone?" I was pretty badly scared myself at that time. I knew that No. 4 was due there about that time. I continued to listen, of course. I heard the dispatcher say something like this. "They are not gone?" "Are they gone; are you sure they are gone?"

H. S. FAIRBANKS, called and sworn as a witness on behalf of defendant, testified as follows:

As train conductor I was running on train between Needles and Kingman on the railroad of the defendant on the 20th of November,

1901 On that date I met train No. 3 at Drake. I arrived at Drake at 4:15, and left there at 4:45, and just after train No. 3 had gone through that station. I waited at Drake thirty minutes for train No. 3. We started out with our train immediately after train No. 3 had passed. I gave the signal to start just as soon as train No. 3 got by me. No. 3 went through Drake on that occasion one or two minutes before 4:45.

107 *Deposition of Richard H. Ross.*

Deposition of RICHARD H. ROSS, taken on behalf of plaintiff, was read in evidence on behalf of defendant; said witness, upon the taking of said deposition, testified:

I reside at Needles, California; have been in the employ of the defendant company as conductor and brakeman since November, 1897. On the morning of the Franconia wreck I was at Yucca. We arrived at Yucca that morning somewhere around 4:20 and remained there something like thirty-five minutes. The crew on my train at that time consisted of the engineer, fireman, two brakemen and myself. I do not remember the names of the members of the crew other than the engineer, Mr. H. C. Hall. I was in the caboose at the time train No. 3 passed Yucca. My train was a freight train. Train No. 3 did not stop at Yucca. My train pulled out as soon as No. 3 passed. I did not communicate with the telegraph operator at that station after No. 3 went by. I saw the engineer on my train at Yucca. When we arrived at Yucca I found out that train No. 3 was later than the time given me, and I went to the head end of the train and told Engineer Hall, and got him to go out and get water, and he went out on the main line and got a supply of water, and then returned onto the side track. We were eastbound. Immediately after ariving at Yucca I went to the operator there and got the information that train No. 3 was late. I did not see the engineer on my train after No. 3 passed and before my train pulled out of the station. I saw No. 3 pass, but I do not know the time.

108 She passed at about 5 o'clock, but I cannot give the exact time. I cannot say whether I looked at my watch at the time No. 3 passed through the station. The next time I saw the operator at Yucca he told me that train No. 3 passed Yucca :57. I was told that by the operator on my next trip going up or coming down. I do not know his name; he was then the operator at Yucca. I do not remember the conversation I had with him at that time. My train was No. 34. I asked the operator what time he put us out of Yucca, and he said :57. I do not recollect that he gave me the time that No. 3 passed. The conversation related to the time that my train left there on that occasion. My brakeman was at the switch when No. 3 passed, and he opened the switch and we pulled right out. I do not remember having any conversation with Engineer Hall shortly after hearing of the Franconia wreck, with reference to the time of the passing of train No. 3 by Yucca station. I do not recollect of having any conversation with Mr. Hall on that subject. I did not at any time say in substance to Mr. Hall that train

No. 3 passed through Yucca at 4:55. I cannot state the exact time No. 3 passed through Yucca. As I remember it, on the occasion I had this conversation with the operator at Yucca, I asked him what time he put my train out of Yucca, and he said "4:57, arrival of No. 3." I have no recollection of ever having told Mr. Hall that train No. 3 passed through Yucca station at 4:55 A. M. the morning of the Franconia wreck, but I won't deny that I made such a statement. I do not recollect of having any conversation
109 with Mr. Hall on the subject of the Franconia wreck until just lately.

Hereupon defendant offered, and there was received in evidence, without objection, a map showing the line of defendant's railroad between Kingman, Arizona, and Needles, California, and also the names of the several stations along the line, and also the time-table schedule of time for train No. 3 over said portion of defendant's railroad, and also showing approximately the place of collision between trains Nos. 3 and 4; said map was marked Defendant's Exhibit No. 4, and a photograph copy thereof, reduced to about one-fourth the size of said original, is attached at the end of this bill of exceptions, marked Defendant's Exhibit No. 4, and is hereby made a part of this bill of exceptions.

*Deposition of H. C. Hall.*

Deposition of H. C. HALL, taken on behalf of plaintiff, was read in evidence in rebuttal on behalf of plaintiff, and said witness in said deposition testified as follows:

I am a locomotive engineer. I was employed as a locomotive engineer on the railroad of the defendant on the 20th of November, 1901. On the morning of that day I was employed in that capacity on a freight train, which was sidetracked at Yucca station. I had a conversation with Conductor Ross of my train on that same trip at Hancock station; that is about sixteen or seventeen miles east of Yucca. The conversation related in part to the time when
110 train No. 3 had passed through Yucca station. After leaving Yucca the first stop we made was at Hancock station, and we laid there quite a while. We went in there to let train No. 4 pass. By getting on top of the cars you can look over the country there, and I walked back over the train and could not see No. 4 coming. I found Conductor Ross in the caboose, and had a talk with him. Just what the conversation was I cannot remember now. But to the best of my knowledge I will tell you what was said. I said: "Conductor, what time did we leave Yucca?" He said: "At :55, my understanding; I think we left there at 4:55." Of course he did not say the words "4:55," because he said ":55." After that we laid there quite a while, and I talked to him about flagging back to Drake, which we sometimes do, to get orders to get out of there. Hancock was not a telegraph station. Drake was. I do not know what time train No. 3 passed through Yucca. I do not remember whether there was anyone present at the time of this conversation.

I think Conductor Ross came out on the cupalo and we talked on top of the car. I do not remember the names of the fireman and brakemen on the train. Conductor Ross did not say anything to me about how he got this time, whether he got it from his watch, or from the operator. I supposed he got it from his watch

Cross-examination:

The run from Yucca to Hancock usually occupies from an hour and ten to fifteen minutes; the run is up-grade. We
111 must have been at Hancock some place between thirty-five and fifty minutes before I went back over the train.

Hereupon both parties rested.

Thereupon defendant, by its counsel, renewed its motion for a judgment of nonsuit, on the grounds:

1. That the evidence failed to show or establish any cause of action in favor of the plaintiff and against defendant; and

2. That the evidence showed that plaintiff was injured by the negligence of his fellow-servants.

Said Court, both said parties, by their respective counsel consenting thereto, reserved its ruling upon said motion for nonsuit until after the argument and submission of the cause for decision.

That thereafter, and before the termination of the trial said Court made an order denying each of defendant's said motions for a judgment of nonsuit in said cause, and defendant then and there duly excepted to said order and to the ruling of said Court in denying each of said motions.

Exception No. 6.

That thereafter and on the 26th day of January, 1904, and before the making or filing of the findings of fact and conclusions of law by the Court in said cause, said defendant, by its counsel, duly requested said Court in writing to make in said cause a finding or declaration of law in words and figures as follows:

I.

That there was no evidence produced in this cause showing, or tending to show, that said defendant was guilty of or charge-
112 able with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause, or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint.

That said Court overruled and denied defendant's said request and defendant then and there duly excepted to said ruling of the Court.

Exception No. 7.

That at the same time defendant in the same manner and form requested said Court to make a finding or declaration of law in said cause in words and figures as follows:

II.

That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant.

That said Court overruled and denied said last mentioned motion or request, and defendant then and there duly excepted to said ruling of the Court.

Exception No. 8.

That thereafter and on or about the second day of February, 1904, said Court made and filed in said cause its findings of fact and conclusions of law in favor of plaintiff and against defendant,
113 and ordered that judgment be entered in favor of plaintiff and against defendant for the sum of $9,000, together with costs.

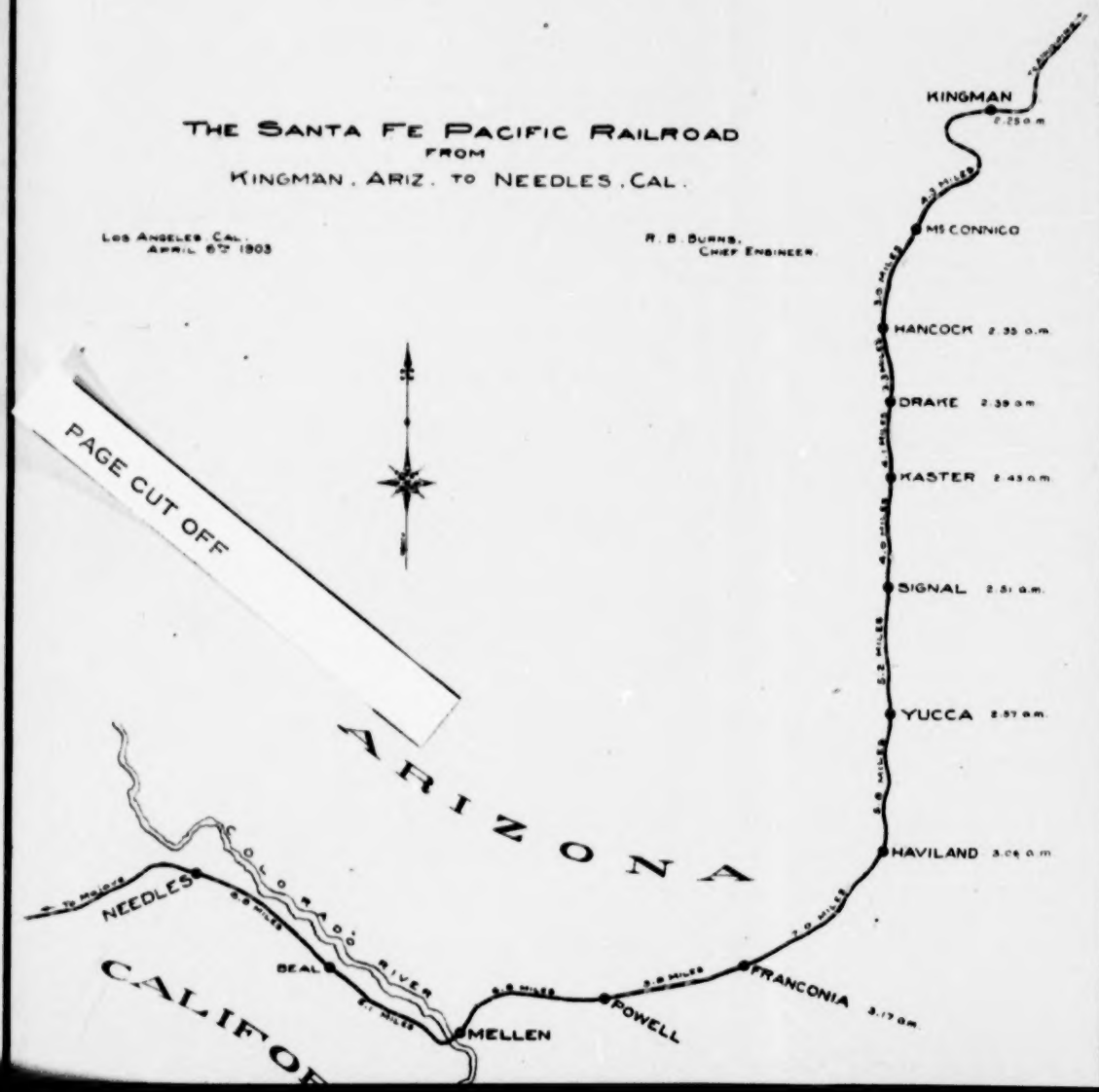
Defendant hereby excepts to that portion of No. 1 of said findings of fact and conclusions of law wherein it is found that the accident and collision mentioned in said findings was caused or resulted by reason of negligence and want of care on the part of defendant through its train dispatcher, for the reason and on the ground that there was no substantial evidence produced in said cause supporting, or tending to support, said finding.

Defendant excepts to that portion of No. III of said findings of fact and conclusions of law wherein it is found that the accident and collision referred to in said findings "was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of a fellow-servant or fellow-servants, the negligence of which said defendant through its train dispatcher and fellow-servant or fellow-servants, proximately contributing to the aforesaid collision, injuries and damages," for the reason and on the grounds that there was no substantial evidence produced in said cause supporting, or tending to support, the conclusion that defendant, through its train dispatcher, was guilty of or chargeable with any negligence or carlessness which proximately or directly caused or contributed to cause said collision, injuries and damages, or any part thereof.

That defendant excepts to No. IV of said findings of fact and conclusions of law, for the reasons and on the grounds that there
114 was no substantial evidence produced in said cause supporting, or tending to support, said findings, or any part thereof.

(Here follows map marked p. 115.)

No 235
Santa Fe Pacific R.R.Co. p. 115
Lauretta Holmes.



117 The following document marked Plaintiff's Exhibit No. 1 is a full and true copy of Plaintiff's Exhibit No. 1 ibefore mentioned:

PLAINTIFF'S EXHIBIT 1.

Fe Pacific Railroad Co. General Regulations for Employees and General Rules. In Effect October 22, 1897.

*General Notice.*

s of the utmost importance that proper rules for the govern- of the employees of a railroad company should be literally and ately enforced, in order to make such rules efficient. If they t or ought not to be enforced, they ought not to exist. Officers ployees whose duty it may be to make or enforce rules, how- emporary or unimportant they may seem, should keep this in mind. If in the judgment of anyone whose duty it is to e a rule, such rule cannot or ought not to be enforced, he l at once bring it to the attention of those in authority.

employees should be required to be polite and considerate in intercourse with the public. The reputation and prosperity of pany depend greatly upon the promptness with which its busi- s conducted and the manner in which its patrons are treated employees.

*General Regulations for Employees.*

All employees will be regarded as in the line of promotion, cement depending upon the faithful discharge of duty and capacity for increased responsibility.

Appointments to the position of conductor, engineman, fireman, brakeman, or train baggageman, must not be made the candidate shall have been examined as to his knowledge understanding of the rules relating to his duties, and the ap- ment approved by the superintendent.

nors must not be employed in any department unless the writ- onsent of their parents or guardians has been received, which n consent must be witnessed by some responsible person known head of the department in which the minor is to be employed.

If an employee should be disabled by sickness or other cause, ght to claim compensation will not be recognized. An allow- if made, will be gratuity justified by the circumstances of the nd the employee's previous good conduct.

Employees must wear the prescribed badges or uniforms while uty.

No person will be permitted to ride on an engine except the eman, fireman and other designated employees, in the discharge ir duties, without a written order from the proper authority.

Accidents, detention of trains, failure in the supply of water or

fuel, or defects in the track or bridges, must be promptly reported by telegraph to the superintendent.

In the event of an accident to a train, the conductor in charge may call upon the trackmen or any employee of the company to render assistance. Refusing or neglecting to comply with such orders, will be considered just cause for dismissal. Should a change of engines be necessary, and instructions cannot be obtained by special
119 order, the conductor of a superior class train may take the engine of an inferior class train, reporting the fact from the next open telegraph office.

No excuse will be taken for unnecessarily delaying trains that are on limited time.

Conductors, enginemen, station agents, trackmen and others must not assume any responsibility on information in regard to train movements, unless such information be communicated by special order.

6. Passenger, baggage, mail and express cars must in all cases be coupled from the car platforms.

Stepping upon the front of approaching engines, jumping off or on trains or engines moving at high speed, getting between cars in motion to uncouple them, and all similar imprudences are dangerous and in violation of duty. Employees are warned that if they commit them it will be at their own peril and risk.

*Conductors.*

7. Conductors report to and receive their instructions from the superintendent.

They will be held responsible for the safe management of their trains, for the strict performance of duty of all persons employed thereon, and report to the superintendent any misconduct, insubordination, or neglect of duty of such employees.

8. They must know that their trains are at all times provided with red flags, red lanterns, a sufficient number of ordinary lanterns, torpedoes, links, pins, oil, etc., and everything necessary to
120 enable them to comply with the regulations of the road.

9. They must be at their trains and ready for duty thirty minutes before leaving time, and earlier if required.

10. They will see that their brakemen are at their trains thirty minutes (and earlier if required) before the time of departure, and that this interval is industriously employed by them in inspecting their trains and making ample preparations for the trip.

11. They will always have a brakeman stationed on the rear car when the train is in motion, and the brakes on that car must be known to be in good order before the train starts.

They will carry a red flag by day and a portable red light at night in the rear car.

They will report all unsafe or insufficient brakes to the foreman of car repairs without delay.

12. They must be particular to give the numbers of engines or cars which may cause any delay or to which an accident may occur.

Should any car be left short of destination, the fact must be reported by telegraph to the superintendent, stating cause.

They will report promptly, by telegraph to the superintendent, any defective switch or target lights noticed by the trainmen.

They will report to the superintendent all matters pertaining to the business of the road that their enginemen may request them to report.

13. They must instruct their brakemen in all their duties, and caution them as to the special dangers of their business.

14. They must make out promptly at the end of each trip
121 all the reports required of them by the several departments; they will strictly observe any special instructions that may be placed upon any of the blanks used for reports, and will take proper care that their reports are punctually and safely deposited in the proper places.

They must keep a memorandum-book in which to note down the date of any occurrence important to remember, and all the details of consequence.

15. They will, before commencing their trip, ascertain positively whether all trains due have arrived; this will also apply at intermediate stations where trains end their trips. In order to promote security in this matter, all conductors, on arrival at terminal stations, and other stations designated in the time tables, will register their arrival or departure, as required, on blanks furnished for that purpose, adhering strictly to the forms given in said blanks; these blanks must be examined carefully by all conductors interested, and especially to inform themselves as to what signals may have been carried by preceding or opposing trains.

16. They will not permit new or inexperienced brakemen to open or close switches. They must not give a train a signal to start on or out of a switch until after the switch is turned and the lock is hasped; and in no case attempt to close a switch until the last wheels are entirely off the switch rails.

They must require their men, whose duty it is to open or close switches while trains are passing, to stand on the side of the track remote from the switch stand.

Running switches must not be made, and all switching
122 must be done at moderate speed, and with great care. In switching, should cars be moved from the proper point for loading or unloading, they must be replaced.

17. They will make a detailed report, in writing, to the superintendent, of all accidents or injuries, to persons or property, that may occur upon or in connection with their train; also the names and residences of witnesses, if any, and all particulars of the occurrence.

18. They will advise the superintendent of any neglect or lack of attention upon the part of agent or others whose duties require their co-operation in the movement of trains.

19. They must, in all places and under all circumstances, regard the safety of the train as of the first importance, and leave nothing undone which will insure safety.

20. Orders used by conductors must be sent by them daily, to the superintendent.

Passenger Conductors.

21. They are particularly required to be respectful and considerate in their intercourse with passengers, giving them politely any information desired, and use every endeavor to contribute to their pleasure and comfort, consistent with the rules of the company. They will make themselves acquainted with routes of travel in general, and especially those in the vicinity of the road, and keep fully informed as to connections with other roads.

22 They must not permit gamblers to practice their vocation upon the trains.

23. They must keep themselves carefully informed of all
123 the general orders, circulars from the general ticket office, and other notices relating to their duties as conductors.

24 They, with their trainmen, will assist ladies, children and infirm persons on or off trains. This applies at terminal as well as intermediate stations.

25. They will have their trainmen on the platform on approaching and leaving all stations and railway crossings at grade, and be ready to apply the hand brakes in case the air brakes should fail.

26. They must know that the cars in their trains have been inspected at terminal or other stations required, and by testing, that air brake, whistle, or bell cord signals are in proper working order.

27. They will require their trainmen to give particular attention to the ventilation and heating of coaches, and see that it is done. The temperature of each coach in winter must be kept between 65 and 72 degrees.

28. They must not signal their trains to start while passengers are getting on or off the train.

29. They will report at the first telegraph station at which their train may stop, any detention to their train of five or more minutes, giving cause of delay.

When approaching a junction or terminal station where passengers change cars, and stations where trains stop for meals, the announcement of these stations, changes to be made, and the length of time to stop, mut be made by the conductor or trainman from center of each coach. All announcements of stations at which the train stops must be made by the trainman while standing
124 about the center of car with door closed.

They will require their trainmen to pass through the coaches immediately after the arrival of their trains at the terminal stations, and collect any packages or articles of any kind which may have been left by passengers. Every article found will be labeled with the date, number of the train on which found and by whom, and left with the baggage masters or agents at points where their trips may end.

30. They will look to the printed matter sold on their trains and see that nothing improper is offered; should anything improper be

offered, they will prevent its repetition, and promptly report the fact to the superintendent.

They will not permit more than one news agent at a time to ply his vocation on the train.

## Freight Conductors.

31. Conductors of freight trains must make themselves acquainted with the duties of enginemen, firemen and brakemen, and enforce the rules and regulations applicable to them upon their trains, and report to the superintendent all insubordination, neglect of duty or misconduct.

32. They are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity, and as nearly on time as the prompt performance of work and rules of the road will permit.

125 33. They must not permit drovers or attendants in charge of live stock to ride on their trains unless provided with permits or passes from the proper officer. They will render those in charge of stock every assistance possible in taking care of the stock. Passengers will not be carried on any freight trains except as provided for on the time tables of the respective divisions.

34. They are required to take a complete tally of their trains before departing from their terminal stations, and they must know that they have bills for all loaded cars in their trains.

They must not take loaded cars without the proper waybills, nor waybills without the proper cars. If waybills are not ready to go forward with the cars they will decline to take them.

They will be held responsible for freight while in their charge. In leaving loaded cars at stations they will leave them at the most convenient place for unloading, and in such cases act in harmony with the agent.

They must take loaded cars from all stations when they can haul them, although their trains may be behind time. When loaded cars destined for any station are left at another station the waybills must be left with them.

35. They must personally check from the car, way-freight unloaded and delivered from their trains. The property must be checked in the presence of the agent, and in the event there is any freight over, short, or damaged, the fact must be noted on the waybill and proper report sent to the superintendent.

126 They are required to deliver way-freight on the platform at the freight-house, or at such other proper and reasonable place as the agent may designate.

They must exercise care in loading and unloading freight, using every effort to prevent loss or damage, and will see that the property contained in the car — in a safe position, so as not to be damaged by the oscillation or jar of the train.

They must not permit unauthorized persons to enter cars or handle freight on their train; they will report any confusion or want of method upon the part of agents in loading freight.

36. They must use great care in the handling and loading of carbon or inflammable oils, and under no circumstances will it be loaded with other freight that can be damaged by it. So far as practicable it should be loaded in stock-cars.

Cars or tanks containing carbon oil or its products must in no case be hauled next to the engine or coupled to the caboose. They should be at least four cars from the engine and four cars from the caboose.

37. They must see that the doors of all loaded, light freight and stock-cars are closed and fast, and when waiting upon siding, and at other times, they must exercise necessary watchfulness to prevent cars from being broken open, and the contents thereof stolen or damaged.

Should a car become disabled or from any cause be left on a side-track where there is no agent, the conductor will deliver the waybill, if any, to the agent at the next regular station, and endorse on the waybill when, where and why left, and report the facts by
127 telegraph to the superintendent, giving number, initial, with what loaded, and destination.

When it is necessary for trainmen to transfer freight from one car to another, the reason for such transfer, and the condition of freight transferred, must be noted on the face of the waybill, and the number of the car into which the freight was transferred must be inserted, and the number originally entered crossed out.

38. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by station agents for such work, and they will perform the same to a reasonable amount. Conductors when at stations doing business will attend personally to the switching, unless engaged in checking the unloading of way-freight as provided in Rule 35, when they may allow brakemen, if competent, to do the switching.

39. They will use every effort to prevent delay to empty as well as loaded cars at stations, and must properly move the same as the necessities of the road require; they will pick up cars wherever they can be found in readiness for shipment by their trains until they have full trains. Cars loaded with livestock must always be moved in preference to freight, and perishable property in preference to other freight. When necessary to switch out freight for the purpose of taking on stock, or for any other cause, a full report must be made from the next telegraph station, giving locality and assigning
128 reason why such car or cars were left.

When cars are taken on at intermediate stations they must be carefully examined. Great care must be taken to set brakes properly on cars left on sidings; conductors must see that cars already there are safely and properly left. Should brakes be deficient the cars must be blocked, and the fact explained to the station agent. Cars or engines must always clear the main or other adjoining tracks a safe distance.

When cars are taken into train or left on sidings, while train is

in motion, or when train is on sidetrack for passing trains, the conductor must know personally that there is nothing projecting from any car in the train which would strike any passing train, person thereon, or bridge, switch stand, etc.

40. They must see that the couplings, wheels, journals and brakes of the cars in the train are in good order by inspecting them, when their duties will permit, as often as the train stops to take water or while waiting at meeting or passing point, but will under no circumstances run a train over thirty miles without stopping to examine running gear. They must use the utmost care to prevent the heating of journals. Any box showing a tendency to heat must receive immediate attention. They will require their brakemen to aid them in the examination of their trains. In the ordinary performance of duty upon the road, conductors will carefully collect and
129 preserve all broken drawbars, brakes, rods, coupling links and pins, car doors and other broken material of their cars—all such material will be taken to terminal stations and delivered by the conductor to the shop foreman or some other person designated to receive the same.

They must carefully examine all the seals and locks of cars when taken and left, and keep a record of the number and condition of the same, and are particularly required to see that the doors of all cars containing livestock are securely fastened.

## Brakemen.

41. Brakemen report to and receive their instructions from the superintendent. While on duty they are under the direction of the conductor.

They will be furnished, upon the requisition of their conductor, with a complete set of train signals, which they must keep in good order and ready for immediate use.

42. In the absence of air, they are required to stop their trains at stations and control them when descending grades without waiting for signals to slacken speed. Brakes should not be applied so tightly as to slide wheels, and on heavy grades they should be frequently changed from one car to another so as to avoid heating the wheels.

The post of the rear brakeman is on the last car in the train, which he must not leave while the train is in motion, except to apply the brakes, without instructions from the conductor.

43. Brakemen should inspect carefully, at every stop, the
130 condition of the journals, wheels, brakes and coupling apparatus, and if anything in connection therewith is out of order it must be immediately reported to the conductor. In descending grades and in approaching railway crossings at grade, and passing through stations, all the brakemen must be at their post on top of the train. In descending grades the speed of the train is ordinarily to be regulated by the use of several of the rear brakes.

44. They are expected to be orderly, polite and attentive to duty, to guard well the company's property, thereby deserving promotion.

45. Passenger brakemen will assist the conductor in proper dis-

position of passengers, and will aid them in all things requisite to the prompt and safe movement of trains, and the comfort and convenience of the passengers.

46. They will be respectful and courteous to all passengers, aiding them in getting on and off cars, giving polite attention to the comfort and wishes of all, and when necessary to enforce the rules against anyone, it must be done in a gentlemanly way; quietly and politely. In case of objection or resistance to the enforcement of rules by the passenger, the brakeman will not bandy words or argue with the passenger, but report at once to the conductor. The use of profane, vulgar or impertinent language will result in a discharge, no matter what the provocation may be.

131 Special attention is called to the rules for protecting trains and the necessity of prompt and strict compliance therewith. Do not wait for instructions from the conductor, but act at once in all cases where the rules require it.

When it is necessary to pass through sleeping-cars they will do so quietly, to avoid disturbing passengers.

## Enginemen.

47. Enginemen will, in all matters relating to the department of motive power, report to and receive their instructions from the master mechanic or his proper representative, but in all matters connected with the movement of trains they will receive their instructions from the superintendent.

48. They will be held responsible jointly with the conductor for the safety of the train, and for the faithful and intelligent use of all the precautions required by the rules governing the movement of trains. Before commencing their trip or day's work, they must examine all notices posted for their guidance, in order to ascertain if there is anything requiring their special attention.

They must obey orders of yard-masters, or persons in charge in regard to switching and making up trains.

They must be ready for duty at least thirty minutes before the designated time, and have their engines in good working order, supplied with the necessary tools, fuel and water.

132 49. They are under the directions of the conductor as regard the management of trains, but will not obey any instructions that may endanger the safety of the train or require violation of rules. When the conductor is disabled the engineman will have full charge of, and be held responsible for the safety of the train, until he can communicate with the superintendent (by telegraph if possible) or an authorized person assumes charge of it.

50. They must have in their possession a copy of the rules, the time-table, and a full set of signals in good order, and ready for immediate use. Each engine must be supplied with eight torpedoes, two white lights, two white flags, three red lights, two red flags, two green flags and two green lights.

51. They must remain on the footboard at all stations, ready to start promptly on signal, except when it is necessary for them to "oil

up" or examine engine. Care must be taken to start trains without jar, and in setting out or taking on cars, to avoid annoyance to passengers and damage to property.

They must at all times keep a sharp lookout to see that no portion of the train becomes detached without their instantly observing it. They will also require their firemen to do so when not necessarily otherwise engaged.

They must promptly obey signals given. When in doubt as to the meaning of a signal they must stop and ascertain the cause.

133 52. They must notice whether watchmen and flagmen are at their posts, and report to the superintendent any neglect of duty they may observe. They will also report the absence of lights at switches where such lights should be shown.

53. They will not permit the firemen to operate the engines except in their presence or as provided in the instructions to firemen.

54. They will at all times keep their signal bell or air whistle in good working order, and will not allow the signal cord to be disconnected from the signal bell at fuel, water and other stations until the train shall be brought to a full stop.

55. They must use the utmost caution to prevent running over stock, and engines must come to a full stop if necessary to avoid killing or injuring the same.

They will report to the master mechanic and conductor, at the end of each trip, all the facts connected with the striking of any person, animal, or wagon, upon or near the track.

56. They must not allow wood, coal, waste or hot cinders to be thrown from the locomotive or tender while the train is in motion; nor ashpans to be cleaned, or cinders dumped, except at points where it can be done with safety, and under no circumstances may it be done near depot platforms or watertanks.

They must use every precaution against fire when passing bridges or buildings. The dampers of ashpans must be closed when running.

134 57. They are required to observe the position of all switches, and if there be levers, targets or lights, to see that they indicate that switches are properly adjusted. They must know (so far as it is possible for them to do so), that switches are right before attempting to pass or use them.

58. They must start with care, and it is their duty to see before they get beyond the limit of the station that no portion of their train is detached.

Enginemen of all trains will slacken their speed where ballast is being put under the track.

59. They must, on observing a signal to stop, acknowledge such signal by two short blasts of the whistle, and bring their engine to a stop close to the signal, and in no case pass it.

They will, on approaching all stations, sound the whistle at the posts set up as signals for that purpose.

They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 349.

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They will, on approaching all stations, sound the whistle at the posts set up as signals for that purpose.

They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 349.

60. They must, while running after dark, have one red lantern lighted and in good burning order in the cab, where it cannot be seen by passing trains. This lantern is to be used to signal approaching trains in case of danger.

61. When they leave their engine under steam, the throttle must be fastened shut, the reverse lever fixed on the center, and the tender brakes must be set tight.

62. They will not be permitted to change their engines while on the road except in case of accident or sudden illness, and in all cases such changes must be made through the superintendent's department.

When their runs are completed at other than terminal stations they must not leave the vicinity in which they are stationed without permission from the superintendent.

63. They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required that they will not only attend to all signals and all instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety.

64. Orders used by enginemen must be sent by them daily to the superintendent.

## Firemen.

65. Firemen, when on the road, are under the direction of the enginemen, and subject to the orders of the superintendent. While in the shop they are under the orders of the master mechanic or foreman of the shop.

They must be on their engines at least thirty minutes before time of starting, and conform to the directions they may receive from the enginemen.

They must keep their engines clean.

66. They must assist in keeping a constant lookout upon the track and must instantly give the engineman notice of any obstruction or signal they may perceive.

They must make themselves familiar with train rules, including those that apply to the protection of trains, and must understand the use of signals and be prepared to use them promptly.

67. They must not attempt to run an engine in the absence of the engineman without permission from the superintendent, unless they are directed to do so by the conductor or some officer in authority in consequence of some special emergency.

They must take charge of the engine should the engineman at any time be absent, and will not leave it until his return, and under no circumstances permit an unauthorized person to be upon it.

68. They must ring the bell when required.

When their train is starting from a station they must look back until the last car has passed the platform safely and properly, and to notice any signal from the station or trainmen.

## Yardmasters.

69. Yardmasters are under the direction of the superintendent. They will have charge of the yard and sidetracks at stations where trains are made up, the movement of trains therein and of the entire yard force. They are responsible for the prompt movement of cars, the proper position of the switches, and the expeditious dispatch of trains within the limits of the yard.

They will carry out the instructions of the superintendent in regard to the distribution of cars, and the making up of trains.

They must give the necessary directions for switching and
137 placing cars in proper positions in trains, and see that trains leave on time unless unavoidably prevented from so doing.

They must see that the engines, with their crews, and the conductors and trainmen are ready for duty at the required time.

They must not permit a train to start with an engineman, fireman, conductor or brakeman who is under the influence of liquor or unfit for duty, nor fail to report such occurrence at once to the superintendent.

They must see that the yard is kept in good order, that cars passing are properly inspected, and that all cars ordered there by car inspectors are sent promptly to the shop.

They must report to the superintendent all disobedience of rules coming under their notice, and all cars arriving in a damaged condition.

## Car Inspectors.

70. Car inspectors will report to and receive their instructions from the master mechanics, but will obey all orders of the superintendents, and report to them as they may direct.

Car inspectors must carefully examine the running gear and brake fixtures of all cars passing their stations. They will make such repairs to cars as may be required, and send to the shop all those not fit for service.

They must give special attention to the passenger, baggage, mail and express cars, and permit none to leave their stations that
138 are not in good running order. When making repairs to cars standing on main tracks or sidetracks, they must protect themselves by placing a blue signal on the drawhead, on the platform, or step of the car at each end of the train to prevent the cars from being coupled to or moved while they are making repairs.

## News Agents.

71. News agents must be neat and clean in their person and dress, polite to passengers and others with whom they may come in contact.

While soliciting sales they shall not be permitted to individually importune or annoy passengers, but may announce, in a moderate

tone of voice, at intervals not exceeding four times in each car, the articles offered for sale.

They shall not be permitted to deposit their papers, books, etc., in the laps of passengers.

They shall not be permitted to pass through the sleeping-cars more often than once every hour, and never when berths are down or passengers are out for meals.

They shall not be permitted to carry with them more than one trunk (or box), and one hamper, which must be placed in and taken from the car with care so as not to mar the platforms, steps or corner posts.

They must, while on duty on a train, wear a badge with the words "news agent" displayed upon the front of their hats or caps.

139 Station Agents.

72. Station agents are under the direction of the superintendent, but will obey all orders or instructions issued by the several officers of the company, relating to the business of their respective departments.

They are required to make themselves familiar with all the rules of the company, and particularly those which in any way relate to their duties.

73. They will have general charge of the buildings and property of the company at their respective stations, and will also be held responsible for property intrusted to the company in the transaction of business. They will inspect daily all rooms and places in connection with the stations, and see that they are neat and clean, paying particular attention to the outhouses. They will keep the grounds connected with their station clean and in proper condition.

They will exercise a general supervision over all persons employed at their stations, and it is their duty to enforce quiet and order in and about the same. They will see that their subordinates are respectful and courteous in their intercourse with the patrons of the company.

74. They are requested and required to use all proper means to secure traffic for the road, avoid giving offense, and act with a view of accommodating the public and promoting the best interests of the company, and shall keep the traffic department promptly advised of any thing affecting the traffic at their stations.

140 75. They will report promptly to the superintendent all switches that have been run through or switch locks broken, giving the number of train and engine.

76. They must know that all cars standing on sidetracks are entirely out of the way of passing trains, and in no case will they allow cars to remain on sidetracks without brakes being properly applied thereto; if the brakes of such cars are out of order the wheels must be blocked.

They will not permit wood, timber or freight of any kind to be placed within eight feet of any track.

77. They will inform conductors as to where cars for loading and

unloading are to be placed at their respective stations, and conductors will be governed accordingly. Before allowing cars to be loaded they will examine them and see that they are in proper condition for loading.

They must see that cars are loaded and unloaded promptly. They must endeavor to have their loaded cars taken by trains at the earliest possible moment. When a conductor refuses or fails to take cars that are ready to go, the agent will report the facts to the superintendent, giving the name of the conductor and the number of cars in the train.

78. They must attend to the loading of all freight, whether handled by stationmen or shippers, to see that it is safely and properly stowed.

When cars are loaded by shippers, care must be taken to see that they are not overloaded. Agents are required to exercise special care in securing the doors or other openings of cars loaded
141 with livestock. They must not permit dangerously loaded cars to leave their stations.

When a car is left at any way station except its destination, in consequence of being out of repair, or for any other reason, it shall be the duty of the agent where such car is left, to notify the superintendent, by telegraph, stating what is necessary to repair it. If the car cannot be repaired promptly, and contains perishable property, the agent will have the freight transferred and forwarded immediately.

79. Agents must not allow persons wishing information as to shipments from or consignments to their station to have access to their books. Any information referring personally to an applicant should at all times be promptly given. Letters and statements relative to the company's affairs must not be shown to shippers and others, except so far as may be necessary for the guidance and instruction of the company's employees. All correspondence must be carefully preserved.

They must keep a file of general orders, notices from the general officers, etc., for preservation and for the instruction of the assistants, as well as for reference.

80. They will be held responsible for the safekeeping and proper delivery of all goods received and for all charges thereon. All articles mentioned upon waybills will be considered as having been received by the agent at the destined station and in good order, unless otherwise stated by him on the face of the waybill.

They will be held responsible for the correct tallying of all freight forwarded by, or received from passing freight trains. They
142 must compare the receipts and deliveries with the bills, at the train, and notify the conductor, upon the spot, of any deficiencies.

81. They must have their ticket offices open at least thirty minutes before the departure of any passenger or local freight train, and keep them open until after the departure of such train, and they should make every proper effort to prevent passengers from getting upon trains without tickets.

They must not sell tickets to points at which trains do not stop.

They must not sell tickets to persons who are not in a condition to take care of themselves (unless accompanied by a proper person), or whose conduct might endanger their own lives, or jeopardize the safety or protection of other passengers on the train.

They must take pains to give travellers all the information they can as to routes, change of cars, and time of trains; and should keep themselves fully informed relative to these matters.

82. Agents flagging trains to take on passengers must, in all cases, give the enginemen due notice by displaying signal in order to enable them to make the required stop in a proper manner.

## Telegraph Department.

83. The telegraph department is under the charge of the superintendent of telegraph.

Chief train dispatchers, acting as division operators, will
143 report to and receive instructions from the superintendent of telegraph in all matters pertaining to their telegraphic duties.

84. Operators will be under the immediate charge of the chief train dispatchers of the divisions on which they may be employed.

They must not leave their offices before the arrival of an expected train that is due; if it is late, permission to leave must first be obtained from the train dispatcher.

85. Office hours will be arranged by the chief train dispatcher, as the necessities of the service may require.

At stations where a day operator only is employed, he will inform the night watchman, or the nearest track foreman, where he may be found during the night. He must not leave the vicinity in which he is stationed, even after business hours, without special permission.

When a train is at his station, the operator must be in his office, and not upon the platform, unless the delivery of train orders or important messages actually requires his presence there.

86. Operators are required to familiarize themselves with the rules for the movement of trains by telegraph, and each requirement must be observed to the letter. They must see that they are supplied with proper signals for stopping trains; and will have such signals in order and ready for immediate use. Signal lamps must be properly trimmed and filled before dark each day. A supply of torpedoes must also be kept on hand in a convenient place and ready for use.

144 87. They will observe rule No. 474. When offices are closed for the night the signal will be fastened at safety and the light extinguished.

They will be required to use every effort to avoid delaying trains when inquiry is made for orders. The correct time of arrival and departure of trains must be reported. The time must be taken from the office clock and not from trainmen.

They will keep the time of trains properly indicated upon the bulletin boards at offices where they are in use.

They will observe the rear of all trains passing their stations, and

if markers are not displayed they will at once report the omission to the superintendent.

## Section and Bridge Foremen.

88. Section foremen will report to and receive instructions from the roadmasters.

Bridge foremen will report to and receive instructions from the general foremen of bridges and buildings.

89. They must have a copy of the time-table of the division upon which they are employed with them when on duty, understand its use, and know the time of all trains at the point of their work. They will see that each gang of workmen have the necessary signals always with them while at work, and that they understand the use of such signals.

90. They will, in the morning before going to work, or whenever passing telegraph offices, ascertain from the station agents or telegraph operators, whether all trains due have passed.

145 91. They will in no case allow their hand or repair cars to be used on the main track on Sundays or in the night (other than on the railroad company's business), without permission from their roadmaster, and in all cases subject to the rules on time-table and general rules. A red light must be exhibited on all hand or repair cars that may be running on the main track after dark.

When hand or repair cars are not in actual use they must be lifted off the track and placed entirely clear of passing trains, and when not under the immediate eye of the men must be locked. They must not be placed on highway crossings except to permit trains to pass.

92. They must watch every train as it passes, observe whether notices are thrown off and see whether signals are exhibited on the engine, denoting whether another section is following. Under the present system of running trains by telegraph, it is necessary to be prepared at all times for extra trains.

93. They will report at once to the roadmaster the failure on the part of trainmen to respect a signal, giving the number of train and engine, and also the name of the conductor and engineman.

The signals to be used in addition to torpedoes are red, green and white flags by day, and red, green and white lanterns by night. Red signifies danger; green, caution, and white, safety.

94. Whenever it is necessary to remove or replace a rail in the track, or to repair a bridge, culvert, cattle-guard, or structure,

146 or in the event of any cause by which the track is rendered unsafe for the passage of trains, danger signals—red and torpedoes—must be placed 1,500 yards (about 30 telegraph poles), in each direction from point of danger, and men must remain with signals until the track is clear, and in case a curve or the summit of a grade is near the point of 1,500 yards, the signals must be sent farther to insure safety.

When the track is safe for trains to pass, but at reduced speed, the

danger signal will be removed and a caution signal—green—put in its place, and a safety signal—white—must then be used to designate the place where trains may resume schedule speed.

95. Repairs of tracks, bridges, or structures that will render the track unsafe for the passage of trains, must not be commenced within twenty minutes of the time of a passenger train, or until it has passed. Neither must the track be obstructed for any length of time without due notice having been given to the superintendent, and his acknowledgment received; nor must the track ever be obstructed in any way without first having the proper signals posted.

96. During heavy storms of wind, rain, or snow, whether by night or day, by which injury may be done to the track or bridges, section foremen will at once go over their sections with danger signals, to ascertain if the track is safe for the passage of trains, and points most likely to be injured must be visited first, and especial care must be given road crossings, frogs, switches, and water tanks, that they may be clear of ice and snow.

147 97. Section foremen, or one or more of their men, must pass over their entire track every day (Sunday included), and see that the track is in safe condition. They will especially look at all frogs, switches, culverts and cattle guards, and know that each is in perfect condition for the safe movement of trains.

98. Section foremen are expected to remain and work with their men; and when going over their sections on handcars must have at least one man faced to the rear.

99. They will be held responsible for the safe condition of the fences inclosing the railroad grounds, and in case of a temporary break will at once repair it. They must not permit stock to be pastured on the company's right of way.

100. They will be held responsible for all tools and materials left in their charge, and will report the loss or destruction of the same to the roadmaster, and all unused spikes, chairs, fishplates, bolts, or other light material must be taken each day to the carhouse and locked up. They will pick up each day any material lost from cars or engines, such as car doors, brakes, links, pins, bolts, nuts, or other property belonging to the company, and take it to the carhouse, reporting the same to the agent daily, and any packages or articles of freight that may fall from any train will be taken to the station agents.

101. They must use every effort to obtain full information as to killing or injuring of stock on the track, and will promptly
148 report the facts in the case of their respective roadmasters. They will strictly adhere to the instructions on any blank forms which may be furnished for use in such cases.

102. They will see that fires caused by engines are promptly extinguished, and all damages to the railroad company's property, and that of adjoining property holders, must be reported at once to their respective roadmasters, on the blank furnished for this purpose.

103. They will report at once to the superintendent and road-

master any engine or train that has run through a switch, giving the number of the engine, train and date.

104. They will notice any injury to the telegraph lines, poles or wires, and will report the same at once to the nearest station agent, to be forwarded to the telegraph repairer, or the proper officers, and when the injury can be substantially and temporarily repaired by themselves, will do so without delay. They will, when necessary, render temporary assistance to the telegraph repairer.

### Bridge Watchmen.

105. Bridge watchmen will report to and receive instructions from the roadmasters.

They will go over the bridges under their care, immediately before and after the passage of every train, carefully examining all parts of the bridges, especially examining as to danger from fire. They will daily inspect the trusses, rods, fastenings, track, floor, etc., and promptly report to the track foreman any defect which may be discovered. If from any cause a bridge is believed to be unsafe,
149 it shall be the duty of the watchman to stop all approaching trains by the use of proper signals. They must keep a supply of water upon the bridge at close intervals, and follow every train with a bucket of water to extinguish any coals that may have fallen from the engine.

## GENERAL RULES.

301. The rules herein set forth apply to and govern all roads operated by the Santa Fe Pacific Railroad Co.

They shall take effect at 12:01 P. M., Friday, October 22d, 1897, and supersede all prior rules and instructions, in whatsoever form issued, which are inconsistent therewith.

302. In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, whether in conflict with these rules or not, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

303. The head of each department must be conversant with the rules, supply copies of them to his subordinates, see that they are understood, enforce obedience to them, and report to the proper officer all violations and the action taken thereon.

304. Every employee whose duties are in any way prescribed by these rules must always have a copy of them at hand when on duty, and must be conversant with every rule. He must render all the assistance in his power in carrying them out, and immediately report any infringement of them to the head of his department.
150 305. The fact that any person enters, or remains in the service, will be considered as an assurance of willingness to obey its rules. No one will be excused for the violation of any of them even though not included in those applicable to his department.

306. If in doubt as to the meaing of any rule, or special instructions, application must be made at once to the proper authority for an explanation. Ignorance is no excuse for neglect of duty.

307.

308.

309. Every employee while on duty connected with the trains on any division of the road, is under the authority, and must conform to the orders of the superintendent of that division.

310.

311. All persons engaged in performing any service on a train are subject to rules governing employes of the company.

## Standard Time.

312. Observatory standard time is the only recognized standard, and will be transmitted from St. Louis, Mo., Washington University Observatory to the designated offices.

313. The standard time will be telegraphed to all points from the designated offices at 9:00 A. M., mountain time, daily.

314. Certain clocks will be designated as standard clocks.

151 315. Conductors and enginemen must not take time from any clock unless it is designated as a standard clock.

316. Each conductor and engineman must have a reliable watch which has been examined and certified to on a prescribed form, by a designated inspector, and must file such certificate with the superintendent before he is allowed to go on duty. Watches must be examined and certificates renewed every six months.

## Certificate of Watch Inspector.

(Form of Certificate.)

This is to certify that on.....18...
the watch of.....
employed as .....
on the.....R.....
has been examined and found to be a reliable and accurate timepiece, and in such repair as will, in my judgment, with proper usage, enable it to run within a variation not to exceed thirty seconds per week.

Name of Maker.....
Brand .....
Number of Movement.....
Gold or Silver.....
Open or Hunting Case.....
Stem or Key Winding.....
Signed .....
Address .....

*Inspector.*

317. Each conductor and engineman must compare his
152 watch with the designated standard clock before starting on each trip, and register his name and the time he compared his watch on a prescribed form.

318. Conductors and enginemen whose duties prevent them from having access to a standard clock must compare their watches daily with those of conductors and enginemen who have standard time, and have registered as provided in Rule 317.

## Time Tables.

319. A time-table is the general law governing the time of all regular trains at all stations. The times given for each train on the time-table is the schedule of such train.

320. Each time-table, from the moment it takes effect, supersedes the preceding time-table and all special instructions relating thereto. A train of the preceding time-table shall, unless otherwise directed, take the time and rights of the train of the same number on the new time-table.

A train of the new time-table which has no corresponding number on the preceding time-table shall not run until it is due to start from its initial point on any division after the time-table takes effect.

321. Upon the time-table not more than two sets of figures are shown for train at any point. When two times are shown, the earlier is the arriving time and the later the leaving time. When one time is shown it is the leaving time, unless otherwise indicated.

Regular meeting or passing points are indicated on the time-table by figures in full-faced type.

153 Both the arriving and leaving time of a train are in full-faced type when both are meeting or passing times, or when one or more trains are to meet or pass it between those times.

Where there are more trains than one to meet or pass a train at any point, attention is called to it by the numbers of such trains being shown in small figures in close proximity to the time of trains to be met or passed.

In all cases trains are required to clear and follow as per Rules 385 to 390 inclusive.

322. On the time-table the words "daily," "daily except Sunday," etc., printed at the head and foot of the schedule of a train indicate when it shall run. The following signs placed before the figures indicate:

"S"—regular stop.

"f"—stop on signal to receive or discharge passengers or freight.

"¶"—stop for meals.

Trains are designated by numbers and their class indicated on the time-tables.

## SIGNAL RULES.

### Signals.

323. All employees whose duties may require them to give signals, must provide themselves with the proper appliances, and keep them in good order and always ready for immediate use.

324. Flags of the proper color must be used by day, and lamps of the proper color by night or whenever from fog or other cause the day signals cannot be clearly seen.

325. Red signifies danger, and is a signal to stop.

154 326. Green signifies caution, and is a signal to go slowly.

327. White signifies safety, and is a signal to go on.

328. Green and white is a signal to be used to stop trains at flag stations for passengers or freight.

329. Blue is a signal to be placed on a car or an engine to forbid its being moved.

330. A torpedo placed on the top of the rail is a signal to be used in addition to the regular signals.

The explosion of one torpedo is a signal to stop immediately; the explosion of two torpedoes not more than 200 feet apart is a signal to reduce speed immediately, and look out for a danger signal.

331. A fusee is a signal which may be used in addition to the torpedoes or other signals.

332. A flag or lamp swung across the track, a hat or any object waved violently by any person on the track, signifies danger and is a signal to stop.

### Train Signals.

333. A train, while running, must display two green flags by day and two green lights by night, one on each side of the rear of the train, as markers, to indicate the rear of the train. Yard engines will not display markers.

334. A train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear. Yard engines must display two green lights instead of red, except when provided with a headlight on both front and rear.

155 335. Each car on a passenger train while running must be in communication with the engine by a bell-cord or an equivalent appliance.

336. Two green flags by day and night, and, in addition, two green lights by night, displayed in the places provided for that purpose on the front of an engine, denote that the train is followed by another train, running on the same schedule and entitled to the same time-table rights as the train carrying the signals.

337. Two white flags by day and night and, in addition, two white lights by night, displayed in the places provided for that purpose on the front of an engine, denote that the train is an extra.

These signals must be displayed by all extra trains, but not by yard engines.

338. A blue flag by day and a blue light by night, placed on or at the end of a car, engine or train, denote that workmen are at work under or about the car, engine or train. The car, engine or train, thus protected, must not be coupled to or moved until the blue signal is removed by the person who placed it.

When a car engine or train is protected by a blue signal other cars must not be placed in front of it, so the blue signal will be obscured, without first notifying the workman, that he may protect himself.

## Whistle Signals.

339. One long blast of the whistle (thus, ———) is the signal for approaching stations, railroad crossings and junctions.

340. One short blast of the whistle (thus, ——) is the signal to apply the brakes—stop.

156 341. Two long blasts of the whistle (thus, ——— ———) is the signal to throw off the brakes.

342. Two short blasts of the whistle (thus, —— ——) is an answer to any signal, except "train parted."

343. Three long blasts of the whistle (thus, ——— ——— ———) to be repeated until answered as provided in Rule No. 362, is a signal that the train has parted.

344. Three short blasts of the whistle (thus, —— —— ——), when the train is standing (to be repeated until answered, as provided in Rule No. 361) is a signal that the train will back.

345. Four long blasts of the whistle (thus, ——— ——— ——— ———) is the signal to call in a flagman from the west.

Four long followed by one short blast of the whistle (thus, ——— ——— ——— ———) is the signal to call in the flagman from the east.

346. Four short blasts of the whistle (thus, —— —— —— ——) is the engineman's call for signals, from switch tenders, watchmen, trainmen and others.

347. Five short blasts of the whistle (thus, —— —— —— —— ——) is a signal to the flagmen to go back and protect the rear of the train.

348. One long followed by two short blasts of the whistle (thus, ——— —— ——) is a signal to be given by trains on single track, when displaying signals for a following train, to call the attention of trains of the same or inferior class to the signals displayed.

349. Two long, followed by two short blasts of the whistle (thus, ——— ——— —— ——) is the signal for approaching crossings at grade.

157 350. A succession of short blasts of the whistle is an alarm for persons or cattle on the track, and calls the attention of trainmen to danger ahead.

### Bell-cord Signals.

351. One tap of the signal-bell, when the train is standing, is the signal to start.

352. Two taps of the signal-bell, when the train is running, is the signal to stop at once.

353. Two taps of the signal-bell, when the train is standing, is the signal to call in the flagman.

354. Three taps of the signal-bell, when the train is running, is the signal to stop at the next station.

355. Three taps of the signal-bell, when the train is standing, is the signal to back the train.

356. Four taps of the signal-bell, when the train is running, is the signal to reduce speed.

357. When one tap of the signal-bell is heard, while the train is running, the engineman must immediately ascertain if the train is parted, and, if so, be governed by Rule No. 403.

358. Signals of the same number of sounds shall have the same significance when given by other appliances than bell cords and signal-bells.

### Lamp Signals.

359. A lamp swung across the track is a signal to stop.

360. A lamp raised and lowered vertically is the signal to move ahead.

158 361. A lamp swung vertically in a circle across the track, when the train is standing, is the signal to move back.

362. A lamp swung vertically in a circle at arm's length across the track when the train is running, is the signal that the train has parted.

363. A flag, or the hand, moved in any of the directions given above, will indicate the same signal as given by a lamp.

### Fixed Signals.

364. Fixed signals are placed at junctions, railroad crossings, stations, and other points as required. Special instructions will be issued indicating their position and use.

## RULES GOVERNING THE USE OF SIGNALS.

365. A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal, and the fact reported to the superintendent.

366. The unnecessary use of either the whistle or the bell is prohibited. They will be used only when required by rule or law, or when necessary to prevent accident.

367.

368. When a danger signal (except a fixed signal) is displayed to stop a train it must be acknowledged as provided in Rule No. 342.

369. The engine-bell must be rung before an engine is moved.

370. The engine-bell must be rung for a quarter of a mile before reaching every public road crossing at grade, and until it is passed; and the whistle must be sounded at all whistling-posts.

371. When two or more engines are coupled to the head of a train, the leading engine only shall display the signals as provided in Rules Nos. 336 and 337.

372. One flag or light displayed as provided in Rules Nos. 336 and 337 will be regarded the same as if two were displayed; but conductors and enginemen will be held responsible for the proper display of all train signals.

373. When a train is being pushed by an engine (except when shifting and making up trains in yards) a white light must be displayed on the front of the leading car at night, or when the train is obscured by fog or other cause.

374. When a train turns out to meet or be passed by another train the red lights must be removed and green displayed as soon as the track is clear, but the red must again be displayed before returning to its own track.

Headlights on engines, when on side tracks, must be covered as soon as the track is clear and the train has stopped and also when standing at the end of double track.

375. The combined green and white signal is to be used to stop a train only at the flag stations designated by the schedule of that train. When it is necessary to stop a train at a point that is not a flag station for that train, a red signal must be used.

376. White signals must be used by watchmen at public road and street crossings to prevent persons and teams from crossing when trains are approaching. Danger signals must be used only when necessary to stop trains.

377.

378.

## TRAIN-RULES.

### Classification of Trains.

379. Whenever the word train is used it must be understood to include an engine in service with or without cars, equipped with signals as provided in Rules 333 and 334. Regular trains are those represented on the time-table, and may consist of one or more sections. All sections of a train, except the last, must display signals as provided in Rule 336. Extra trains are those not represented on the time-table.

380. All regular trains are classified on the time-table with regard to their priority of right to the track; trains of the first class being superior to those of the second and all succeeding classes, and trains of the second class being superior to those of the third and all succeeding classes; and so on indefinitely.

381. Extra trains may be distinguished as:

Passenger Extra.
Freight Extra.
Work Train Extra.

382. All extra trains are of inferior class to all regular trains of whatever class.

## Movement of Trains.

383. A train of inferior class must in all cases keep out of the way of a train of superior class.

161 384. On single track, all trains in one direction, specified in time-table, have the absolute right of track over trains of the same class running in the opposite direction.

385. When trains of the same class meet on single track, the train not having right of track must take the siding and be clear of the main track before the leaving time of the opposing train; but such train must not pass the switch to back in on a siding until after the arrival of the opposing train, unless otherwise directed by special instructions. When necessary to back in on the siding, before passing the switch, a flagman must be sent out in the direction of the opposing train as per Rule No. 399.

386. When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the siding and clear the train of superior class five minutes. A train of inferior class must keep five minutes off the time of a train of superior class following it.

A first-class train must not arrive at a station where only the leaving time is shown more than ten minutes in advance of its schedule leaving time.

387. A train must not leave a station to follow a passenger train until five minutes after the departure of such passenger train, unless some form of block signal is used.

388. Passenger trains following each other must keep not less than ten minutes apart, unless some form of block signal is used.

389. Freight trains following each other must keep not less than five minutes apart (except in closing up at stations or at meeting and passing points) unless some form of block signal is used.

162 390. A train must not leave a station expecting to meet or to be passed at the next station by a train having the right of track unless it has ample time to reach such station and clear the track, as per Rules Nos. 385 and 386.

391. A train not having the right of track must be entirely clear of the main track by the time it is required by rule to clear an opposing train or a train running in the same direction; failing to do so, it must be immediately provided in Rule No. 39.

392. Except at meeting or passing points, as provided in Rules Nos. 385 to 391, inclusive, a train must not arrive at a station in advance of its schedule arriving time, when shown.

A train must not leave a station in advance of its schedule leaving time.

393. All trains must stop at schedule meeting or passing points on single track, if the train to be met or passed is of the same class,

unless the switches are plainly seen to be right and the track clear. The point at which a train should stop is the switch used by the train to be met or passed in going on the siding.

When the expected train of the same class is not found at the schedule meeting or passing point, the train having right of track must approach all sidings prepared to stop, until the expected train is met or passed.

394. All trains must approach the end of double track, junctions, railroad crossings at grade, and drawbridges, prepared to stop, and must not proceed until the switches or signals are seen to be
163 right, or the track is plainly seen to be clear. Where required by law, all trains must stop.

395. A train must not leave its initial station on any division, or a junction, or pass from double to single track, until it is ascertained that all trains due, which have the right of track over it, have arrived or left.

396.

397.

398. When it is necessary for the flagman to go back to protect the rear of his train, the next brakeman must immediately take the flagman's position on the train, and remain there until relieved by the flagman; and on passenger trains the baggagemaster must take the place of the front brakeman whenever necessary.

399. When a train stops or is delayed, under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail when the conditions require it.

The front of the train must be protected in the same way, when necessary, by the fireman.

400.

401.

402. When it is necessary for a train on double track to cross over to the opposite track, a flagman must be sent out with danger signals, as provided in Rule No. 399.

164 403. If a train should part while in motion, trainmen must use great care to prevent the detached parts from coming into collision. Enginemen must give the signal as provided in Rule No. 343, and keep the front part of the train in motion until the detached portion is stopped.

The front portion will have the right to go back regardless of all trains, to recover the detached portion, first sending a flagman with danger signals a distance of not less than twenty telegraph poles in the direction in which the train is to be backed, and running with great caution, at a speed not exceeding four miles per hour. On single track all the precautions required by the rules must also be taken to protect the train against opposing trains. The detached portion must not be moved or passed around until the front portion comes back. This rule applies to trains of every class.

When it is known that the detached portion has been stopped and the whole occurrence is in plain view, no curves or other ob-

structions intervening, so that signals can be seen from both portions of the train, the conductor and enginemen may arrange for the recoupling, using the greatest caution.

404. When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, to immediately signal the enginemen in case of danger.

405. A train starting from its initial station on each division, or leaving a junction, when a train of the same class running in the same direction is overdue, will proceed on its own time and rights, and the overdue train will run as provided in Rule 388 or 389.

165

406. A train which is delayed, and falls back on the time of another train of the same class, does not thereby lose its rights.

407. Regular trains twelve hours or more behind their schedule time lose all their rights.

408. A train overtaking another train of the same or superior class, disabled so that it cannot move, will pass it, and, if necessary to enable it to proceed, will take the rights and the orders of the disabled train, and proceed to the first open telegraph office, where it will report to the superintendent. The disabled train will take the rights or orders of the last train passing it, with which it exchanged rights or orders, and proceed until the first open telegraph office is reached.

409. All messages or orders respecting the movement of trains or the condition of track or bridges must be in writing.

410. Trains must not display signals for a following train without orders from the superintendent or other authority designated by the superintendent.

411. Extra trains must not be run on single track without an order from the superintendent.

412. When signals displayed for a following train on single track are taken down at any point before the following train arrives, the conductor must inform the superintendent promptly by telegraph, and also the operator or switch-tender; and the latter, unless there is some other provision for the purpose, must notify all opposing trains of the same or inferior class leaving that point before the train arrives for which signals were displayed.

166

If signals are taken down at a point where there is no operator, switch-tender, or other provision for the purpose, the conductor must notify all opposing trains of the same or inferior class until he reaches the next telegraph office, when he must inform the superintendent; and the operator, unless there is some other provision for the purpose, must notify all opposing trains of the same or inferior class until otherwise directed by the superintendent.

If the train for which signals were displayed leaves the main line at a point where there is no operator, switchtender, or other provision for the purpose, a flagman must be left to notify opposing trains that it has arrived.

413. Work trains will be run as extras under special orders, and will be assigned working limits.

414. Great care must be used by the enginemen and trainmen of a train approaching a station where any train is receiving or discharging passengers.

415.

416.

417. Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen, except where switch-tenders are stationed.

167 Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employee.

When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it.

418.

419. A train must not start without a signal from its conductor.

420. Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules.

421. In all cases of doubt or uncertainty take the safe course and run no risks.

## RULES FOR THE MOVEMENT OF TRAINS BY TELEGRAPHIC ORDERS.

450. Special orders, directing movements varying from or additional to the time-table, will be issued by the authority and over the signature of the superintendent. They are not to be used for movements that can be provided for by rule or time-table. They must not contain information or instructions not essentially a part of them.

They must be brief and clear, and the prescribed forms must be used when applicable; and there must be no erasures, alterations or interlineations.

168 451. Each order must be given in the same words to all persons or trains directly affected by it, so that each shall have a duplicate of what is given to the others.

452. Orders will be numbered consecutively for each day as issued, beginning with No. 1 at midnight.

453. Orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to a person acting as pilot. A copy for each person addressed must be supplied by the operator.

454. Each order must be written in full in a book provided for the purpose at the superintendent's office; and with it must be recorded the names of trainmen and others who have signed for the order; the time and signals, showing when and from what offices the order and responses were transmitted; and the train dispatcher's initials. These records must be made at once on the original copy, and not afterward, from memory or memoranda.

455. The terms "superior right" and "inferior right" in these

rules, refer to the rights of trains under the time-table and Train Rules, and not to rights under Special Orders.

456. When an order is to be transmitted, the signal "31" (as provided in Rule 459), or the signal "19" (as provided in Rule 461) meaning "Train Order" will be given to each office addressed, followed by the word "copy" and a figure indicating the number
169 of copies to be made, if more or less than three—thus, "31 copy 5" or "19 copy 5."

457. An order to be sent to two or more offices must be transmitted simultaneously to as many as practicable. The several addresses must be in the order of superiority of rights of trains, and each office will take only its proper address. When not sent simultaneously to all, the order must be sent first for the train having the superior right of track.

458. Operators receiving orders must write them out in manifold during transmission and make the requisite number of copies at one writing, or trace others from one of the copies first made.

459. When an order has been transmitted, preceded by the signal "31," operators receiving it must (unless otherwise directed) repeat it back at once from the manifold copy, and in the succession in which their several offices have been addressed. Each operator repeating must observe whether the others repeat correctly. After the order has been repeated correctly by the operators required at the time to repeat it, the response "O. K." authorized by the train dispatcher, will be sent, simultaneously to as many as practicable, naming each office. Each operator must write this on the order, with the time, and then reply "ii O. K.," with his office signal.

Those to whom the order is addressed, except enginemen, must then sign their names to the copy of the order to be retained by the operator, and he will send their signatures to the superintend-
170 ent. The response "complete," with the superintendent's initials, will then be given, when authorized by the train dispatcher. Each operator receiving this response will then write on each copy the word "complete"; the time; and his last name in full; and will then deliver a copy to each person included in the address, except enginemen, and each must read his copy aloud to the operator. The copy for each engineman must be delivered to him personally by the conductor, and the engineman must read it aloud to the conductor and fireman and understand it before acting upon it.

460. For an order preceding by the signal "31," "complete" must not be given to the order for delivery to a train of inferior right until "O. K." has been given to and acknowledged by the operator who receives the order for the train of superior right. Whenever practicable, the signature of the conductor of the train of superior right must be taken to the order and "complete" given before the train of inferior right is allowed to act on it.

After "O. K." has been given and acknowledged, and before "complete" has been given, the order must be treated as a holding order for the train addressed, but must not be otherwise acted on until "complete" has been given.

If the line fails before an office has received and acknowledged

"O. K." to an order preceded by the signal "31" the order at that office is of no effect, and must be there treated as if it had not been sent.

171 461. When an order has been transmitted, preceded by the signal "19" operators receiving it must (unless otherwise directed) repeat it back at once from the *main* fold copy, and in the succession in which the several offices have been addressed. Each operator repeating must observe whether the others repeat correctly. After the order has been repeated correctly, the response "complete" with the superintendent's initials, will be given, when authorized by the train dispatcher. Each operator receiving this response must write on each copy the word "complete," the time, and his last name in full, and reply "ii complete" with his office signal, and will personally deliver the order to the persons addressed without taking their signatures.

462. For an order preceded by the signal "19," "complete" must be given and acknowledged for the train of superior right before it is given for the train of inferior right.

If the line fails before an office has received and acknowledged the "complete" to an order, preceded by the signal "19," the order at that office is of no effect, and must be treated as if it had not been sent.

463. The order, the "O. K." and the "complete" must each, in transmitting, be preceded by "31" or "19" as the case may be, and the number of the order, thus "31, No. 10" or "19, No. 10." In transmitting the signature of a conductor it must be preceded by "31," the number of the order, and the train number, thus, "31, No. 10, Train No. 5." After each transmission and response the sending operator must give his office signal.

172 464. The operator who receives and delivers an order must preserve the lowest copy. On this must appear the signatures of those who sign for the order, and on it he must record the time when he receives it; the responses; the time when they are received; his own name; the date and the train number, for which places are provided in the blanks. These copies must be sent to the superintendent.

465.

466.

467. For orders delivered at the superintendent's office the requirements as to record and delivery will be the same as at other points.

468. Orders to persons in charge of work requiring the use of track in yards or at other points, authorizing such use when trains are late, must be delivered in the same way as to conductors of trains.

469. An order to be delivered to a train at a point not a telegraph station, or while the office is closed, must be addressed to "C. and E., No. ——— (at ———), care of ———," and forwarded and delivered by the conductor or other person in whose care it is addressed. "Complete" will be given upon the signature of the person by whom the order is to be delivered, who must be supplied with copies for the conductor and engineman addressed, and a copy upon which he shall take their signatures. This copy he must deliver to the first

operator accessible, who must preserve it, and at once advise the train
dispatcher of its having been received.

173 Orders so delivered to a train must be compared by the one
receiving them with the copy held by the person delivering
and acted on as if "complete" had been given in the ordinary way.
Orders must not be sent in the manner herein provided to trains
the rights of which are hereby restricted.

470. When a train is named in an order, all its sections are in-
cluded unless particular sections are specified, and each section in-
cluded must have copies addressed and delivered to it.

471. Meeting orders must not be sent for delivery to trains at the
meeting point if it can be avoided. When it cannot be avoided
special precautions must be taken by the train dispatchers and opera-
tors to insure safety.

There should be, if possible, at least one telegraph office between
those at which opposing trains receive meeting orders.

An operator must not acknowledge the receipt of an order for a
train that is at his station, the engine of which has passed his train
order signal, until he has personally notified the conductor and
engineman that he has orders for them.

Orders should not be sent an unnecessarily long time before deliv-
ery, or to points unnecessarily distant from where they are to be
executed. No orders (except those affecting the train at that point)
should be delivered to a freight train at a station where it has much
work, until after the work is done.

174 472. A train, or any section of a train, must be governed
strictly by the terms of orders addressed to it and must not
assume rights not conferred by such orders. In all other respects
it must be governed by the train rules and time tables.

473. Orders once in effect continue so until fulfilled, superseded or
annulled.

Where more than one movement is included in an order, any
part of the order specifying a particular movement may be superseded.

Orders held by or issued for a regular train are annulled when
such train has lost its rights, as provided by Rules 320 and 407, and
other trains will be governed accordingly.

474. A fixed signal must be used at each train-order office which
shall display red at all times when there is an operator on duty
except when changed to white to allow a train to pass after getting
orders, or for which there are no orders.

When red is displayed all trains must come to a full stop, and may
proceed as long as red is displayed. The signal must be returned
to red as soon as a train has passed. It must only be fastened
at white when no operator is on duty. This signal must also display
red to hold trains running in the same direction the required time
apart. Operators must be prepared with other signals to use promptly
if the fixed signal should fail to work properly. If a signal is not
displayed at a night-office, trains which have not been previously
notified must stop and inquire the cause, and report the
175 facts to the superintendent at the next open telegraph office

When a semaphone is used the arm means red when horizontal and white when in an inclined position.

475. Operators will promptly record and report to the superintendent the time of departure of all trains and the direction in which extra trains are moving. They will record the time of arrival of trains, and report it when so directed.

476. Regular trains will be designated in order by their schedule numbers, as "No. 10," or "2d No. 10," adding engine numbers if desired; extra trains by engine numbers, or "Extra 798"; and all other numbers by figures. The direction of the movement of extras will be added when necessary, as "East" or "West." Time will be stated in figures only.

477. The following signs and abbreviations may be used:

Initials for superintendent's signature.

Such office and other signals as are arranged by the superintendent.

C & E—for Conductor and Engineman.

O. K.—as provided in these rules.

Min.—for Minutes.

June.—for Junction.

Frt.—for Freight.

No.—for Number.

Eng.—for Engine.

Sec.—for Section.

Opr.—for Operator.

176 9—to clear the line for train orders and for Operators to ask for train orders.

31 or 19—for Train Orders, as provided in the Rules.

The usual abbreviations for the names of the months and stations.

## FORMS OF TRAIN ORDERS.

Form A. Fixing Meeting Point for Opposing Trains.

——— and ——— will meet at ———.

## EXAMPLES.

No. 1 and No. 2 will meet at Bombay.

No. 3 and 2d No. 4 will meet at Siam.

No. 5 and Extra 95 will meet at Hong Kong.

Extra 652 North and Extra 231 South will meet at Yokohama.

Trains receiving this order will, with respect to each other, run to the designated point, and having arrived there will pass in the manner provided by the rules.

Form B. Authorizing a Train to Pass or Run Ahead of Another Train Running in the Same Direction.

(1) ——— will pass ——— at ———.
(2) ——— will run ahead of ———, ——— to ———.

EXAMPLES.

(1) No. 1 will pass No. 3 at Khartoum.
(2) No. 4 will run ahead of No. 6 from Bengal to Madras. When under this order a train is to pass another, both trains will run according to rule to the designated point and there arrange for the rear train to pass promptly.

177 Form C. Giving a Train of Inferior Right the Right to Track over an Opposing Train of Superior Right.

——— has right of track over ———, ——— to ———.

EXAMPLES.

(1) No. 2 has right of track over No. 1, Mecca to Mirbat.
(2) Extra 37 has right of track over No. 3, Natal to Ratlam.
This order gives a train of inferior right the right of track over one of superior right, to a designated point.

If the trains meet at the designated point, the train of inferior right must take the siding, unless the rules or orders otherwise indicate.

Under this order, as illustrated by example (1), if the train of superior right reaches the designated point before the other arrives, it may proceed, provided it keeps clear of the schedule time of the train of inferior right as many minutes as the inferior train was before required by the train rules to keep clear of the superior train.

If the train of superior right, before meeting, reaches a point beyond that named in the order, the conductor must stop the other train, where it is met and inform it of his arrival.

Under example (2), the train of superior right cannot go beyond the designated point until the extra train arrives.

When the train of inferior right has reached the designated
178 point, the order is fulfilled, and the train must then be governed by time-table and train rules or further orders.

The following modification of this form of order will be applicable for giving a work train the right of track over all other trains, in case of a wreck or break in the track.

EXAMPLE.

Work train Extra 275 has right of track over all trains between Stockholm and Edinburg, from 7 P. M. ———.

This gives the work train the exclusive right of the track between the points designated.

Form D. Giving All Regular Trains the Right of Track Over a Given Train.

All regular trains have right of track over ——— between ——— and ———.

EXAMPLE.

All regular trains have right of track over No. 1 between Moscow and Berlin.

This order gives to any regular train of inferior right receiving it the right to track over the train named in the order, and the latter must clear the schedule times of all regular trains, the same as if it were an extra.

Form E. Time Orders.

(1) ——— will run ——— late ——— to ———.
(2) ——— will wait at ——— until ——— for ———.

EXAMPLES.

(1) No. 1 will run 20 min. late, Joppa to Mainz.
(2) No. 1 will wait at Muscat until 10 A. M. for No. 2.

Form (1) makes the schedule time of the train named,
179 between the points mentioned, as much later as the time stated in the order, and any other train receiving the order is required to run with respect to this later time, the same as before required to run with respect to the regular schedule time. The time in the order should be such as can be easily added to the schedule time.

Under form (2) the train of superior right must not pass the designated point before the time given, unless the other train has arrived. The train of inferior right is required to run with respect to the time specified, the same as before required to run with respect to the regular schedule time of the train of superior right.

Form F. For Sections of Regular Trains.

——— will carry ——— to ——— for ———.

EXAMPLES.

No. 1 will carry signals Astrakhan to Cabul for Eng. 85.
2d No. 1 will carry signals London to Dover for Eng. 90.
This may be modified as follows:
Engines 70, 85 and 90 will run as 1st, 2d and 3d sections of No. 1, London to Dover.
For annulling a section:
Eng. 85 is annulled as 2d section of No. 1 from Chatham.
If there are other sections following add:
Following sections will change numbers accordingly. The char-

acter of a train for which signals are carried may be stat
180 Each section affected by the order must have copies, and mu
arrange signals accordingly.

Form G. For Arranging a Schedule for an Extra Train.

(1) Eng. ——— will run extra, leaving ——— on ——— on t
following schedule, and will have the right of track over all trai
Leave ———.
Arrive ———.

EXAMPLE.

(1) Eng. 77 will run extra, leaving Turin on Thursday, F
17th, on the following schedule, and will have the right of tra
over all trains:
Leave Turin 11:30 P. M.
Leave Pekin 12:25 A. M.
Leave Canton 1:47 A. M.
Arrive Rome 2:22 A. M.
Example (1) may be varied by specifying particular trains o
which the extra shall or shall not have right of track, and any tr
over which the extra is thus given the right of track must clear
time as many minutes as such train is required to clear the sched
time of a first-class train.

Form H. Extra Trains.

——— will run extra ——— to ———.
(a) Eng. 99 will run extra Berber to Gaza.
A train receiving an order to run extra is not required to gu
against opposing extras, unless directed by order to do so, but m
keep clear of all regular trains, as required by rule.
181 A "work train" is an extra for which the above form
be used for a direct run in one direction. The authority
occupy a specified portion of the track, as an extra while worki
will be given in the following form:
(b) Eng. 292 will work as an extra 7 A. M. until 6 P. M. betw
Berne and Turin.
The working limits should be as short as practicable, to be chan
as the progress of the work may require. The above may be c
bined, thus:
(c) Eng. 292 will run extra Berne to Turin and work extra 7
M. until 6 P. M. between Turin and Rome.
When an order has been given to "work" between designa
points, no other extra must be authorized to run over that part of
track without provision for passing the work train.
When it is anticipated that a work train may be where it ca
be reached for meeting or passing orders, it may be directed to re
for orders at a given time and place, or an order may be given
it shall clear the track for (or protect itself after a certain h

against) a designated extra by adding to example (b) the following words:

(d) And will keep clear of (or protect itself against) Extra 223, south, between Antwerp and Brussels after 2:10 P. M.

In this case, extra 223 must not pass the northernmost station before 2:10 P. M., at which time the work train must be out of the way, or protecting itself (as the order may require) between those points.

182 When the movement of an extra train over the working limits cannot be anticipated by these or other orders to the work train, an order must be given to an extra, to protect itself against the work train, in the following form:

(e) Extra 76 will protect itself against work train extra 95 between Lyons and Paris.

This may be added to the order to run extra.

A work train when met or overtaken by an extra must allow it to pass without unnecessary detention.

When the conditions are such that it may be considered desirable to require that work trains shall at all times protect themselves while on working limits, this may be done under the following arrangements. To example (b) add the following words:

(f) Protecting itself against all trains.

A train receiving this order must, whether standing or moving, protect itself within the working limits (and in both directions on single track) against all trains, in the manner provided in Rule 399.

When an extra receives orders to run over working limits it must be advised that the work train is within those limits by adding *to* example (2) the words—

(g) Eng. 292 is working extra between Berne and Turin.

A train receiving this order must run expecting to find the work train protecting itself within the limits named.

### Form J. Holding Order.

Hold ——— at ———.

183 EXAMPLES.

(1) Hold No. 2 at Berlin.

(2) Hold all trains east at Berlin.

As any order for which "O. K." has been given and acknowledged operates as a holding order for the train to which it is addressed, this form will only be used in special cases, to hold trains until orders can be given or for some other emergency the reason for holding may be added, as "for orders."

This order is not to be used for holding a train, while orders are given to other trains against it, which are not at the same time given to it in duplicate. It must be respected by conductors and enginemen of trains thereby directed to be held as if addressed to them. Conductors when informed of the order must sign it, and their signatures must be sent and "complete" obtained.

When a train has been so held it must not go until the order to hold is annulled, or an order is given in the form:

"——— may go."

This must be addressed to the person or persons to whom the order to hold was addressed and must be delivered in the same manner.

Form K. Annulling a Schedule Train.

——— of ——— is annulled.

EXAMPLES.

(1) No. 1 of Feb. 29th is annulled.

(2) No. 3 due to leave Naples Saturday, Feb. 29th, is annulled.

184 Adding "from Alaska" or "between Alaska and Halifax" when appropriate.

This order takes away all rights of the train annulled and authorizes any train or person receiving it to use the track as if the train annulled were not on the time-table.

If a train is annulled to a point named, its rights beyond that point remain unaffected.

The train dispatcher may direct any operator to omit repeating back an order annulling a train, until he has occasion to deliver it.

When a train has been annulled it must not be again restored under its original number by special order.

Form L. Annulling or Superseding an Order.

"Order No. ——— is annulled."

This will be numbered, transmitted and signed for as other orders.

If an order which is to be annulled has not been delivered to a train, the annulling order will be addressed to the operator, who will destroy all copies of the order annulled but his own, and write on that:

Annulled by order No. ———.

An order superseding another may be given, adding "this supersedes order No. ———," or adding "instead of ———."

EXAMPLE.

No. 1 and No. 2 will meet at Sparta, instead of at Thebes.

An order that has been annulled or superseded must not be again restored by special order under its original number.

185 In the address of an order annulling or superseding another order, the train first named must be that to which rights were given by the order annulled or superseded, and when the order is not transmitted simultaneously to all concerned, it must be sent to the point at which that train is to receive it, and the required response first given, before the order is sent for other trains.

A. G. WELLS,
*General Superintendent.*

Approved:
W. G. NEVIN,
*General Manager.*

| Trains going West -- Seligman to Needles | | | | | Capacity of Siding | Distance from Albuquerque | Ruling Grade Ascending | TIME TABLE 18 November 4, 1901 |
|---|---|---|---|---|---|---|---|---|
| Second Class | | First Class | | | | | | |
| 55 | 35 | 7 | 3 | 1 | | | | STATIONS |
| Daily | Daily | Daily | Daily | Daily | No Cars | Miles | | Leave Ar |
| 5.00 A M | s 10.50 A M | 2.35 P M | 12.05 A M | 3.05 P M | Yard | 428.8 | | CW SELIGMAN |
| f 5.15 | 11.01 | f 2.43 | 12.11 | f 3.13 | 55 | 432.5 | 74.7 | 3.7 CHINO |
| f 5.45 | 11.19 | f 2.55 | 12.21 | f 3.25 | 55 | 439.5 | 74.5 | 7.0 AUBREY |
| 6.15 | 11.40 | f 3.10 | 12.32 | f 3.40 | 55 | 446.7 | 75.0 | 7.2 PIEACHO |
| f 6.55 | 12.15 P M | f 3.25 | 12.50 | f 4.00 | 55 | 452.0 | 75.0 | 5.3 YAMPAI |
| f 7.20 | 12.45 | f 3.40 | 1.01 | f 4.15 | 55 | 459.4 | 0 | 1.4 NELSON |
| s 7.49 | s 1.10 | f 3.52 | 1.11 | s 4.30 | 150 | 465.8 | 0 | 6.4 CY PEACH SP'GS |
| 8.10 | 1.25 | f 4.03 | 1.20 | f 4.40 | 56 | 471.5 | 0 | 5.7 CHEROKEE |
| f 8.30 | 1.40 | f 4.13 | 1.28 | f 4.51 | 55 | 477.8 | 0 | 6.3 TRIXTON |
| f 8.45 | 1.50 | f 4.20 | 1.34 | f 4.58 | 55 | 481.3 | 0 | 3.5 W CROZIER |
| f 9.05 | 2.15 | f 4.33 | 1.45 | s 5.13 | 86 | 489.0 | 0 | 7.7 HACKBERRY |
| 9.35 | 2.39 | f 4.44 | 1.54 | f 5.27 | 55 | 495.1 | 43.8 | 6.1 ANTARES |
| f 9.55 | 3.10 | f 4.55 | 2.03 | f 5.37 | 80 | 501.2 | 43.8 | 8.1 HUALAPAI |
| 10.20 | 3.55 | f 5.10 | 2.15 | f 5.55 | 55 | 510.0 | 46.0 | 8.8 BERRY |
| s 11.00 | s 4.35 | s 5.20 | s 2.25 | s 6.08 | 122 | 516.5 | 50.2 | 6.5 CW KINGMAN |
| | | | | | June. | 520.8 | 0 | 4.3 McCONNICO |
| 12.15 P M | 5.06 | f 5.31 | 2.35 | f 6.23 | 55 | 523.8 | 0 | 3.0 W HANCOCK |
| f 12.35 | 5.21 | f 5.36 | 2.39 | f 6.29 | 55 | 527.1 | 0 | 3.3 DRAKE |
| 1.05 | 5.42 | f 5.42 | 2.45 | f 6.37 | 55 | 531.2 | 0 | 4.1 KASTER |
| 1.25 | 5.59 | f 5.48 | 2.51 | f 6.45 | 55 | 535.2 | 0 | 4.0 SIGNAL |
| f 1.50 | 6.18 | f 5.55 | 2.57 | f 6.55 | 59 | 540.4 | 0 | 5.2 W YUCCA |
| 2.15 | 6.40 | f 6.04 | 3.06 | f 7.07 | 56 | 546.2 | 0 | 5.8 HAVILAND |
| f 2.45 | 7.05 | f 6.13 | 3.17 | f 7.20 | 56 | 553.2 | 0 | 7.0 FRANCONIA |
| 3.10 | 7.31 | f 6.22 | 3.25 | f 7.31 | 55 | 559.0 | 0 | 5.8 POWELL |
| s 3.40 | s 8.05 | f 6.30 | 3.33 | f 7.41 | 43 | 565.8 | 26.4 | 6.8 W MELLEN |
| 4.05 | 8.20 | f 6.39 | 3.40 | f 7.53 | 53 | 570.9 | 27.9 | 5.1 BEAL |
| s 4.35 P M | s 8.40 P M | s ¶ 6.50 P M | s 3.50 A M | ¶ s 8.10 P M | Yard | 577.7 | 46.2 | 6.8 CW NEEDLES |
| Daily | Daily | Daily | Daily | Daily | | | | Arrive La |
| 55 | 35 | 7 | 3 | 1 | | | | |

| Trains going West -- Seligman to Needles | | | | | Capacity of Siding | Distance from Albuquerque | Ruling Grade Ascending | TIME T |
|---|---|---|---|---|---|---|---|---|
| Second Class | | First Class | | | | | | November |
| 35 | 33 | 7 | 3 | 1 | | | | |
| Daily | Daily | Daily | Daily | Daily | No. Cars. | Miles | | STAT |
| 5.00 A.M | s 10.50 A.M | 2.35 P.M | 12.05 A.M | 3.05 P.M | Yard | 428.8 | | Leave CW SELIGM |
| f 5.15 | 11.01 | f 2.43 | 12.11 | f 3.13 | 55 | 432.5 | 74.7 | 3.7 CHINO |
| f 5.45 | 11.19 | f 2.55 | 12.21 | f 3.25 | 55 | 439.5 | 74.5 | 7.0 AUBREY |
| 6.15 | 11.40 | f 3.10 | 12.32 | f 3.40 | 55 | 446.7 | 75.0 | 7.2 PIEACHO |
| f 6.55 | 12.15 P.M | f 3.25 | 12.50 | f 4.00 | 55 | 452.0 | 75.0 | 5.3 YAMPAI |
| f 7.20 | 12.45 | f 3.40 | 1.01 | f 4.15 | 55 | 459.4 | 0 | 7.4 NELSON |
| s 7.49 | s 1.10 | f. 3.52 | 1.11 | s 4.30 | 150 | 465.8 | 0 | 6.4 CW PEACH |
| 8.10 | 1.25 | f 4.03 | 1.20 | f 4.40 | 56 | 471.5 | 0 | 5.7 CHERO |
| f 8.30 | 1.40 | f 4.13 | 1.28 | f 4.51 | 55 | 477.8 | 0 | 6.3 TRUXTO |
| f 8.45 | 1.50 | f 4.20 | 1.34 | f 4.58 | 55 | 481.3 | 0 | 3.5 W CROZIE |
| f 9.05 | 2.15 | f 4.38 | 1.45 | s 5.13 | 88 | 489.0 | 0 | 7.7 HACKBE |
| 9.35 | 2.39 | f 4.44 | 1.54 | f 5.27 | 55 | 495.1 | 43.8 | 6.1 ANTARI |
| f 9.55 | 3.10 | f 4.55 | 2.03 | f 5.37 | 60 | 501.2 | 43.8 | 6.1 HUALAP |
| 10.20 | 3.55 | f 5.10 | 2.15 | f 5.55 | 55 | 510.0 | 46.0 | 8.8 BERRY |
| s 11.00 | s 4.35 | s 5.20 | s 2.25 | s 6.08 | 122 | 516.5 | 50.2 | 6.5 CW KINGMA |
| | | | | | June. | 520.8 | 0 | 4.3 McCONN |
| 12.13 P.M | 5.06 | f 5.31 | 2.35 | f 6.23 | 55 | 523.8 | 0 | 3.0 W HANCOC |
| f 12.35 | 5.21 | f 5.36 | 2.39 | f 6.29 | 55 | 527.1 | 0 | 3.3 DRAKE |
| 1.05 | 5.42 | f 5.42 | 2.45 | f 6.37 | 55 | 531.2 | 0 | 4.1 KASTER |
| 1.25 | 5.59 | f 5.48 | 2.51 | f 6.45 | 55 | 535.2 | 0 | 4.0 SIGNAL |
| f 1.50 | 6.18 | f 5.55 | 2.57 | f 6.55 | 59 | 540.4 | 0 | 5.2 W YUCCA |
| 2.15 | 6.40 | f 6.04 | 3.06 | f 7.07 | 58 | 546.2 | 0 | 5.8 HAVILA |
| f 2.45 | 7.05 | f 6.13 | 3.17 | f 7.20 | 58 | 553.2 | 0 | 7.0 FRANCO |
| 3.10 | 7.31 | f 6.22 | 3.25 | f 7.31 | 55 | 559.0 | 0 | 5.8 POWELL |
| s 3.40 | s 8.05 | f 6.30 | 3.33 | f 7.41 | 43 | 565.8 | 26.4 | 6.8 W MELLE |
| 4.05 | 8.20 | f 6.39 | 3.40 | f 7.53 | 58 | 570.9 | 27.9 | 3.1 BEAL |
| s 4.35 P.M | s 8.40 P.M | s 6.50 P.M | s 3.50 A.M | s 8.10 P.M | Yard | 577.7 | 46.2 | 6.8 CW NEEDLE |
| Daily | Daily | Daily | Daily | Daily | | | | Arrive |
| 35 | 33 | 7 | 3 | 1 | | | | |

VISION

| BLE NO. | Ruling Grade Ascending. | Distance from San Francisco. | Trains going East. -- Needles to Seligman | | | | |
|---|---|---|---|---|---|---|---|
| | | | First Class | | | Second Class | |
| , 1901. | | | 2 | 4 | 8 | 34 | 36 |
| NS Arrive | | Miles | Daily | Daily | Daily | Daily | Daily |
| N | 78.2 | 770.7 | s 2.55 PM | s 8.55 A.M | s .10 AM | s 2.35 PM | s 10.25 PM |
| | 91.5 | 767.0 | f 2.43 | 8.50 | f 2.02 | 1.43 | f 9.55 |
| T | 94.4 | 760.0 | f 2.30 | 8.36 | f 1.48 | 1.12 | f 9.20 |
| | 0 | 752.8 | f 2.15 | 8.25 | f 1.32 | 12.40 | 8.50 |
| N | 95.0 | 747.5 | f 2.00 | 8.17 | f 1.20 | 12.15 PM | f 8.30 |
| | 92.4 | 740.1 | f 1.31 | 8.00 | f 1.01 | 11.40 | f 8.00 |
| GS N | 75.0 | 733.7 | s 1.10 | 7.49 | f 12.25 | s 11.10 | s 7.30 |
| E | 75.0 | 728.0 | f 12.55 | 7.39 | f 12.02 A.M | 10.35 | 7.10 |
| | 95.0 | 721.7 | f 12.40 | 7.29 | f 11.46 | 10.10 | f 6.45 |
| N | 95.0 | 718.2 | f 12.25 | 7.20 | f 11.35 | s 9.45 | 6.25 |
| RY N | 43.2 | 710.5 | s 12.05 P.M | 7.00 | f 11.15 | 9.05 | f 5.55 |
| | 43.2 | 704.4 | f 11.40 | 6.53 | f 11.00 | 8.45 | 5.27 |
| | 33.3 | 698.3 | f 11.34 | 6.44 | f 10.45 | 8.20 | f 4.55 |
| | 95.0 | 689.5 | f 11.20 | 6.33 | f 10.35 | 7.55 | 3.55 |
| N | 95.0 | 683.0 | s 11.00 f 10.40 | s 6.18 | s 10.15 | s 7.25 | s 2.50 |
| O | 92.4 | 678.7 | | | | | |
| | 75.0 | 675.7 | f 10.08 | 5.58 | f 9.45 | 5.[illegible] | 1.40 |
| T | 75.0 | 672.4 | f 10.00 | 5.50 | f 9.39 | 5.35 | f 1.25 |
| | 73.9 | 668.3 | f 9.48 | 5.39 | f 9.29 | 5.10 | 1.05 |
| | 75.0 | 664.3 | f 9.37 | 5.29 | f 9.18 | 4.50 | 12.40 |
| N | 75.0 | 659.1 | s 9.20 | 5.15 | f 9.05 | s 4.20 | f 12.01 P.M |
| O | 75.0 | 653.3 | f 9.00 | 4.54 | f 8.50 | 3.40 | 11.20 |
| A | 75.0 | 646.3 | f 8.44 | 4.44 | f 8.35 | 3.17 | f 10.55 |
| | 61.2 | 640.5 | f 8.27 | 4.34 | f 8.20 | 2.40 | 10.25 |
| N | 74.4 | 633.7 | s 8.12 | 4.25 | f 8.05 | s 2.15 | f 9.50 |
| | 70.4 | 628.6 | f 8.00 | 4.13 | f 7.53 | 1.47 | 9.30 |
| N | 30.2 | 621.8 | 7.45 A.M | 4.00 A.M | 7.40 P.M | 1.30 A.M | 9.00 A.M |
| Leave | | | Daily | Daily | Daily | Daily | Daily |
| | | | 2 | 4 | 8 | 34 | 36 |

ARIZONA DIVISION -- Continued. FIFTH DISTRICT 3

| Trains Going West -- Needles to Barstow. | | | | Capacity of Siding | Distance from Albuquerque | Ruling Grade Ascending | TIMETABLE NO. 16 November 4. 1901. STATIONS Leave / Arrive | Ruling Grade Ascend. | Distance from San Francisco | Trains Going East -- Barstow to Needles | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Second Class | First Class | | | | | | | | | First Class | | | Second Class |
| 33 | 7 | 3 | 1 | | | | | | | 2 | 4 | 8 | 34 |
| Daily | Daily | Daily | Daily | No Cars | Miles | | | | Miles | Daily | Daily | Daily | Daily |
| 10.05 P.M | 7.15 P.M | 4.00 A.M | 8.35 P.M | Yard | 577.7 | 73.9 | CW NEEDLES N | 0 | 621.8 | s¶7.20 A.M | s 3.50 A.M | s¶7.15 P.M | s 11.45 P.M |
| 11.20 | f 7.35 | 4.15 | f 8.54 | 55 | 585.0 | | 7.8 JAVA N | | 614.5 | f 7.02 | 3.35 | f 7.03 | 11.20 |
| 11.50 | f 7.45 | 4.21 | f 9.04 | 55 | 588.9 | 73.9 | 3.9 W KLINEFELTER | 0 | 610.6 | f 6.56 | 3.29 | f 6.55 | 11.09 |
| s 12.25 A.M | f 8.02 | 4.29 | f 9.16 | 55 | 592.3 | 73.9 | 3.4 W IBEX N | 0 | 607.2 | f 6.50 | 3.23 | f 6.49 | 10.58 |
| 12.50 | f 8.15 | 4.37 | f 9.31 | 57 | 596.8 | 73.9 | 4.5 BANNOCK | 0 | 602.7 | f 6.43 | 3.17 | f 6.41 | 10.45 |
| 1.15 | f 8.29 | 4.48 | f 9.46 | 55 | 601.6 | 73.9 | 4.8 HOMER | 21.1 | 597.9 | f 6.35 | 3.11 | f 6.32 | 10.32 |
| s 1.45 | s 8.50 | s 5.05 | s 10.10 | 89 | 609.2 | 73.9 | 7.8 GOFFS N | 52.8 | 590.3 | s 6.25 | s 3.00 | s 6.20 | s 10.10 |
| 2.08 | f 8.58 | 5.12 | f 10.19 | 54 | 614.2 | 0 | 5.0 PIUTE | 52.8 | 585.3 | f 6.04 | 2.40 | f 6.06 | 8.58 |
| 2.25 | f 9.05 | 5.19 | f 10.27 | 55 | 618.8 | 0 | 4.6 FENNER T | 52.8 | 580.7 | f 5.50 | 2.25 | f 5.58 | 8.20 |
| 2.45 | f 9.15 | 5.29 | f 10.38 | 55 | 625.6 | 0 | 6.8 EDSON | 52.8 | 573.9 | f 5.29 | 2.08 | f 5.40 | 7.30 |
| 2.56 | f 9.21 | 5.35 | f 10.46 | 55 | 630.3 | 0 | 4.7 ARIMO | 52.8 | 569.2 | f 5.13 | 1.56 | f 5.28 | 7.07 |
| s 8.11 | f 9.29 | 5.41 | s 10.55 | 55 | 634.8 | 0 | 4.5 W DANBY N | 52.8 | 564.7 | s 5.01 | 1.45 | f 5.19 | s 6.45 |
| 3.28 | f 9.38 | 5.50 | f 11.06 | 54 | 641.8 | 0 | 7.1 SIAM | 44.9 | 557.6 | f 4.41 | 1.23 | f 5.00 | 5.55 |
| 3.42 | f 9.47 | 5.57 | f 11.16 | 44 | 647.3 | 0 | 5.4 CADIZ | 52.8 | 552.2 | f 4.26 | 1.12 | f 4.48 | 5.32 |
| 4.05 | f 9.58 | 6.08 | f 11.30 | 54 | 655.1 | 26.4 | 7.8 BENGAL N | 47.5 | 544.4 | f 4.05 | 1.00 | f 4.33 | 5.10 |
| 4.30 | f 10.07 | 6.17 | f 11.43 | 47 | 661.6 | 10.6 | 6.5 AMBOY | 10.6 | 537.9 | f 3.53 | 12.50 | f 4.13 | 4.50 |
| s 5.05 s 5.50 | s 10.20 | s 6.29 | s 11.59 | Yard | 669.3 | 37.0 | 7.7 CW BAGDAD N | 0 | 530.2 | s 3.40 | s 12.40 | s 4.10 | 4.30 s 3.59 |
| 5.55 | f 10.44 | 6.55 | f 12.30 A.M | 55 | 676.7 | 73.9 | 7.4 SIBERIA | 0 | 522.8 | f 3.22 | 12.30 | f 3.52 | 3.28 |
| 7.25 | f 11.00 | 7.16 | f 12.47 | 52 | 682.0 | 78.9 | 5.3 KLONDIKE N | 0 | 517.5 | f 3.10 | 12.22 | f 3.42 | 3.08 |
| 7.50 | f 11.15 | 7.35 | f 1.03 | 55 | 688.7 | 73.9 | 4.7 ASH HILL | 0 | 512.8 | f 3.00 | 12.15 | f 3.32 | 2.47 |
| s 8.20 | f 11.30 | 7.53 | f 1.20 | 55 | 693.4 | 26.4 | 6.7 W LUDLOW N | 52.8 | 506.1 | f 2.43 | 12.03 A.M | f 3.18 | 2.20 |
| 8.50 | f 11.40 | 8.05 | f 1.34 | 55 | 698.5 | 52.8 | 5.1 ARCTIC | 10.1 | 501.0 | f 2.32 | 11.55 | f 3.08 | 2.07 |
| 9.10 | f 11.50 | 8.15 | f 1.45 | 55 | 702.5 | 52.8 | 4.0 LAVIC N | 10.1 | 497.0 | f 2.25 | 11.50 | f 3.03 | 1.57 |
| 9.25 | f 11.59 | 8.24 | f 1.53 | 57 | 707.1 | 37.0 | 4.6 PISGAH | 52.8 | 492.4 | f 2.17 | 11.43 | f 2.55 | 1.45 |
| 9.40 | f 12.07 A.M | 8.32 | f 2.03 | 55 | 712.7 | 0 | 5.6 HECTOR | 52.8 | 486.8 | f 2.03 | 11.38 | f 2.42 | 1.20 |
| 10.00 | f 12.18 | 8.46 | f 2.15 | 55 | 719.3 | 26.4 | 6.6 TROY | 39.6 | 480.2 | f 1.53 | 11.27 | f 2.30 | 1.05 |
| s 10.30 | f 12.30 | 8.58 | f 2.26 | 84 | 725.7 | 26.4 | 6.4 W NEWBERRY N | 18.0 | 473.8 | f 1.46 | 11.16 | f 2.20 | s 12.50 |
| 10.55 | f 12.40 | 9.07 | f 2.35 | 55 | 731.6 | 24.1 | 5.9 MINNEOLA | 0 | 467.9 | f 1.38 | 11.10 | f 2.10 | 12.25 |
| 11.25 | f 12.51 | 9.15 | s 2.45 | 84 | 737.6 | 38.2 | 6.0 W DAGGETT N | 13.0 | 461.9 | s 1.30 | 11.03 | f 2.00 | 12.10 P.M |
| 11.59 | f 1.00 | 9.25 | f 2.54 | 55 | 741.8 | 47.8 | 4.2 NEBO | 81.7 | 457.7 | f 1.18 | 10.57 | f 1.50 | 11.59 |
| s 12.25 P.M | s 1.10 A.M | s 9.35 A.M | s 3.05 A.M | Yard | 747.0 | 47.8 | 5.2 CW BARSTOW N | 34.7 | 452.5 | 1.10 A.M | 10.50 P.M | 1.40 P.M | s 11.45 A.M |
| Daily | Daily | Daily | Daily | | | | Arrive / Leave | | | Daily | Daily | Daily | Daily |
| 33 | 7 | 3 | 1 | 6 | | | | | | 2 | 4 | 8 | 34 |

Trains Going West -- Barstow to Bakersfield.

| Second Class | First Class | | | Capacity of Sidings | Distance from Albuquerque | Ruling Grade Ascending | TIME TABLE NO. 16 November 4, 1901 |
|---|---|---|---|---|---|---|---|
| 33 | 7 | 5 | 3 | | | | STATIONS |
| Daily | Daily | Daily | Daily | No. Cars | Miles | | Leave / Arrive |
| 1.40 P.M | 1.30 A.M | 1.35 P.M | 9.55 A.M | Yard | 747.0 | | CW BARSTOW |
| | | | | | | 21.2 | 10.0 |
| 2.20 | f 1.45 | f 2.05 | 10.12 | 55 | 757.0 | | W HINKLEY |
| | | | | | | 34.3 | 9.7 |
| 2.55 | f 2.00 | f 2.30 | 10.30 | 55 | 766.7 | | HIAWATHA |
| | | | | | | 34.3 | 5.6 |
| 3.20 | f 2.10 | f 2.50 | 10.42 | 55 | 772.3 | | JIMGREY |
| | | | | | | 28.1 | 7.8 |
| s 3.55 | s 2.20 | s 3.15 P.M | 10.57 | 75 | 780.1 | | KRAMER |
| | | | | | | 24.3 | 8.6 |
| 4.25 | f 2.31 | | 11.15 | 55 | 788.7 | | RICH |
| | | | | | | 23.2 | 9.2 |
| 5.00 | f 2.45 | | 11.30 | 46 | 797.9 | | W RODRIGUEZ |
| | | | | | | 23.2 | 9.3 |
| 5.30 | f 2.59 | | 11.48 | 55 | 807.2 | | BISSELL |
| | | | | | | 50.2 | 11.0 |
| s 6.10 P.M | s 3.10 A.M | | s 12.05 P.M | Yard | 818.2 | | CW MOJAVE |
| | | | | | | | 67.0 |
| 2.45 A.M | 6.40 A.M | | 3.30 P.M | | 885.2 | | KERN JUNC. |
| | | | | | | | 2.5 |
| 3.00 A.M | 6.50 A.M | | 3.40 P.M | Yard | 887.7 | | CW BAKERSFIELD |
| Daily | Daily | Daily | Daily | | | | Arrive / Lea |
| 33 | 7 | 5 | 3 | | | | |

ntinued

| No. | Ruling Grade Ascending | Distance from San Francisco | Trains Going East -- Bakersfield to Barstow | | | | |
|---|---|---|---|---|---|---|---|
| | | | First Class | | | Second Class | |
| 1901 | | | 4 | 6 | 8 | 34 | |
| Arrive | | Miles | Daily | Daily | Daily | Daily | |
| N | | 452.5 | s 10.30 P.M | s 12.10 A.M | ¶s 1.15 P.M | s 10.35 A.M | |
| | 77 | 442.5 | 10.10 | f 11.42 | f 1.01 | 10.12 | |
| | 24.0 | 432.8 | 9.57 | f 11.16 | f 12.50 | 9.36 | |
| | 12.2 | 427.2 | 9.48 | f 11.01 | f 12.38 | 9.10 | |
| N | 12.1 | 419.4 | 9.37 | 10.40 P.M | s 12.28 | s 8.45 | |
| | 35.4 | 410.8 | 9.24 | | f 12.16 | 8.10 | |
| | 34.8 | 401.6 | 9.12 | | f 12.01 P.M | 7.45 | |
| | 0 | 392.8 | 9.00 | | f 11.48 | 7.20 | |
| N | 0 | 381.3 | 8.45 P.M | | 11.35 A.M | s 6.45 A.M | |
| N | | 314.3 | 5.40 P.M | | 8.10 A.M | 11.33 P.M | |
| FLD N | | 311.8 | 5.30 P.M | | 8.00 A.M | 11.18 P.M | |
| Leave | | | Daily | Daily | Daily | Daily | |
| | | | 4 | 6 | 8 | 34 | |

The following document marked "Plaintiff's Exhibit No. 2" is a ll and true copy of Plaintiff's Exhibit No. 2 hereinbefore men- ned.

PLAINTIFF'S EXHIBIT No. 2.

(Holmes Case.)

SANTA FE PACIFIC RAILROAD COMPANY, ARIZONA DIVISION.

Time-Table.

No. 16.

Superseding Time-Table No. 15, in Effect June 16, 1901.

TO TAKE EFFECT MONDAY, NOVEMBER 4, 1901.

At 12:05 A. M.

"Pacific" Time is standard.

For the Information and Government of Employees Only.

Note Important Changes in Special Rules.

Times-Mirror Print, Los Angeles.

(Here follow tables marked pp. 186, 187 and 188.)

189 SPECIAL RULES.

1. EASTBOUND TRAINS HAVE THE RIGHT OF TRACK OVER WESTBOUND TRAINS OF THE SAME CLASS WHEN RUNNING STRICTLY IN ACCORDANCE WITH GENERAL RULES.

2. No passenger, other than employees traveling on Company business or Surgeons of the Hospital Association traveling on business of the Company or the Association, may be carried on trains 33 or 34, except from or to stations marked "s" on face of time-table. All other freight trains may carry passengers to or from stations marked "s" or "f," with respect to schedule of trains 35 and 36, but may not be flagged at any other station to pick up or discharge passengers, excepting employees, or Surgeons of the Hospital Association traveling on Company business.

3. The number of tons shown by rate sheet as ordinary trains for engines, is based on the general grade, but between points where the grades and other conditions are favorable, more cars can frequently be hauled, and conductors and enginemen are required to fill up trains to full capacity of their engines.

4. No engine must be detached from train while in motion. When train is stopped on grade a sufficient number of brakes must be set on front and rear cars to prevent them from running in either direction, and must not be released until engine is again attached to train and sufficient train line pressure has been accumulated.

190 5. Air brakes must be tested from rear end of train before leaving any station where cars have been picked up or set out, or engine has been detached from train. Trainmen will be held responsible for knowing that air is cut in and working through entire train.

6. All second-class and extra trains must approach and pass through yard limits under full control, and be prepared to stop within the limit of vision. Responsibility for accident at such point will rest with approaching train. This rule does not excuse the obstruction of main track unnecessarily or failure to send out proper signals for first-class trains. At such stations as have no yard limit signs, the limits of the yard will be considered to be between extreme switches.

First-class trains, when ten minutes or more late, are required to approach stations, which are designated in time-table rules as having yard limits, under full control, prepared to stop within the limit of vision, and responsibility for accident under such conditions shall rest with the approaching train. It will be necessary under such conditions for yard or road crews within yard limits to protect against trains of the first-class, although they must, of course, give way at the earliest possible moment on the approach of such trains of the first-class.

7. Yard limit boards, defining yard limits, have been established at the following stations: Seligman, Kingman, Needles, Bagdad, Barstow and Mojave.

8. "X"—denotes day and night telegraph station.
191 "G"—denotes night telegraph station only.
"T"—denotes day telegraph station only.
"C"—denotes fuel station.
"W"—denotes water station.

9. The speed of passenger trains will ordinarily be that prescribed in the schedule, but in cases of delay, requiring greater speed in order to enable trains to make meeting points, or to secure connections, the speed may be moderately increased above that prescribed in the schedule, as, in the judgment of the conductor and enginenan in charge of the train, may be safe and prudent, due consideration being always given to condition of track, and all the circumstances. Consolidation engines (237 and Class, 248 and Class and 266 and Class) running light or pulling train, may not exceed a speed of twenty-four (24) miles per hour, i. e., will consume two and one-half (2½) minutes in running each and every mile. Engines of all other classes when pulling freight trains may not exceed a speed of thirty (30) miles per hour, i. e., will consume not less than two (2) minutes in running each and every mile. Trains in which dead engines are being towed may not exceed a speed of fifteen (15) miles per hour, i. e., will consume not less than four (4) minutes in running each and every mile.

10. Conductors and enginemen must have copy of General Rules in their possession at all times.

11. Look out at all sidings for derailing switches, the normal position of which would cause derailment.

192 12. Conductors of all trains will register at Seligman, Needles, Goffs, Bagdad, Barstow, Kramer and Mojave. Conductors of trains Nos. 3 and 4 will throw off "soup ticket" (form 903) at Kramer and operator will register these trains.

13. No train may leave Seligman, Needles, Goffs, Bagdad, Barstow or Mojave without receiving a train order (form 31 or 19) or a clearance card (form 902). No. 6 may not leave Kramer without receiving a train order (form 31 or 19) or a clearance card (form 902.)

14. All trains must reduce speed to ten (10) miles an hour in crossing the iron bridge over the Colorado river at Mellen. Air must not be applied or released while crossing this bridge.

15. Standard clocks are located in the depot telegraph offices at Seligman, Needles, Bagdad, Barstow and Mojave.

16. For movement of trains between Mojave and Kern Junction, see So. Pac. Co.'s time-table.

17. For movement of trains between Kern Junction and Bakersfield, see S. F. & S. J. V. Ry. time-table.

18. No. 7 will stop at any point between Seligman and Barstow to let off passengers from east of Seligman, and may also be flagged at any point between Seligman and Mojave to take on passengers for Northern California points, but must not be flagged to take on passengers for Southern California points.

19. Brakeman and firemen are to fully acquaint themselves with the contents of all train orders held by conductors and enginemen

of train upon which they are employed, and it must be under-
193 stood that they have entire right, and it is their duty to demand full information of this character from conductors and enginemen. Brakemen and firemen should read train orders aloud to conductors and enginemen, as the case may be, so that there will be no misunderstanding as to their purport.

20. RULES GOVERNING SIGNALS WEST END BARSTOW YARD.—Eastbound trains on San Bernardino line will be protected against trains using cross-over between Mojave and San Bernardino line by Home and Distant signals operated by interlocked ground lever stand worked by trainmen. Interlocking rules will govern except that in case Home signal is found at "Stop," trainmen must investigate condition of track before proceeding.

Trainmen wishing to use cross-over, must proceed as follows:

No. 1 lever being nearest to track; First, throw lever No. 1 and set Distant signal to "Caution." Second, throw lever No. 2 and set Home signal to "Stop." Third, throw lever No. 3 and set switches for cross-over.

Before doing the last it will be advisable to wait five seconds so that any train which has seen the Distant signal at "Clear," can get under control. After using cross-over, they must set the machine normal, as follows:

First, throw lever No. 3, and set switches for main line. Second, throw lever No. 2, and set Home signals at "Clear." Third,
194 throw lever No. 1 and set Distant signals at "Clear."

All must be safely locked before leaving.

SURGEONS OF THE S. F. P. AND S. C. HOSPITAL ASSOCIATIONS.

Dr. N. H. Morrison, Chief Surgeon.....Los Angeles, Cal.
Dr. A. Tyroler.....Seligman, Arizona.
Dr. A. E. Ealy.....Kingman, Arizona.
Dr. W. F. Freeman.....Needles, Cal.
Dr. A. R. Rhea.....Barstow, Cal.
Dr. J. L. Carson.....Bakersfield, Cal.

W. G. NEVIN,
*General Manager, Los Angeles, Cal.*
JOHN DENAIR,
*Superintendent, Needles, Cal.*
E. H. COAPMAN,
*Trainmaster, Needles, Cal.*
A. G. WELLS,
*General Superintendent, Los Angeles, Cal.*

The document, Plaintiff's Exhibit 5, hereinbefore referred to and on file in the records of this cause is to be attached to this bill of exceptions at this point.

(Here follows table marked pp. 195 and 196.)

197 The foregoing contains all of the evidence offered and received upon said trial excepting only the testimony relating solely to the extent, character and permanency of the injuries sustained by said plaintiff upon the occasion of and by reason of the accident and collision mentioned in the evidence and the amount of damage resulting thereby to said plaintiff.

The foregoing bill of exceptions duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Dated this 21st day of March, 1904.

OLIN WELLBORN, Judge.

[Endorsed]: No. 1027. U. S. Circuit Court, 9th Cir. So. Dist. of Cal., Southern Division. Laurete Holmes, Plaintiff, vs. Santa Fe Pacific Railroad Company, Defendant. Bill of Exceptions. Filed Mar. 21, 1904. Wm. M. Van Dyke, Clerk. T. J. Norton, E. E. Millikin, Paul Burks, 516 Conservative Life Building, Los Angeles, Cal. Telephone Main 1466. Attorneys for Deft.

198 In the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Petition for Writ of Error.*

Now comes the Santa Fe Pacific Railroad Company, defendant herein, and says that on or about the third day of February, 1904, this court made and entered judgment herein in favor of said plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this
199 cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

T. J. NORTON,
E. E. MILLIKIN,
*Attorneys for Defendant.*

[Endorsed]: No. 1027. U. S. Circuit Court, 9th Circuit, Southern District of California, Southern Division. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. Peti-

tion for Writ of Error. Filed Mar. 28, 1904. Wm. M. Van Dyke, Clerk. T. J. Norton, E. E. Millikin, Paul Burks, 516 Conservative Life Building, Los Angeles, Cal. Telephone Main 1666. Attorneys for Deft.

In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Assignment of Errors.*

The defendant in this action in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred on the trial of the cause, to wit:

200 I.

That said Court erred in rendering judgment on the merits in said cause for the reason that the complaint in said cause did not state an action within the jurisdiction of said Court, and said complaint failed to show that said Court had jurisdiction of said cause.

II.

That said Court erred in rendering the judgment made and entered in said cause for the reason that said complaint is insufficient to sustain said judgment.

III.

That said Court erred in rendering the judgment made and entered in said cause for the reason that the findings of fact made by said Court in said cause do not sustain said judgment and are insufficient to justify said judgment.

IV.

That said Court erred in rendering the judgment made and entered in said cause for the reason that the conclusions of law made and found by said Court in this cause are insufficient to justify said judgment and do not sustain said judgment.

V.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law.

201

VI.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particulars, to wit:

1. The facts found are insufficient to show that the negligence or want of care mentioned in said findings on the part of defendant's train dispatcher amounted to a violation of any duty owing from the defendant to the plaintiff under or by virtue of the relation of employer and employee or the contract of employment existing between plaintiff and defendant and mentioned in said complaint.

2. That the facts found are insufficient to show that the negligence or want of care on the part of defendant's train dispatcher mentioned in said findings was in violation of any duty owing from defendant to plaintiff by reason of the relation or contract aforesaid, the performance of which duty had been delegated by defendant to said train dispatcher.

3. The findings do not show but what said negligence and want of care on the part of defendant's train dispatcher was the negligence of a fellow-servant or co-employee of plaintiff.

4. The findings are insufficient to show that defendant's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from

202 defendant to plaintiff by reason of the relation or contract aforesaid.

5. The findings are insufficient to show that defendant's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from defendant to plaintiff by reason of the relation or contract aforesaid, the performance and discharge of which had been delegated by defendant to said train dispatcher.

VII.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particular, to wit:

That the facts found do not show but that the collision and each and all of the injuries complained of were solely caused by negligence, carelessness and want of care on the part of the fellow-servants and co-employees of plaintiff.

VIII.

That the trial court erred in making and rendering that portion of its findings of fact and conclusions of law wherein it is found that the accident and collision mentioned in said findings was caused or resulted by reason of negligence and want of care on the part of defendant through its train dispatcher; for the reason and

on the ground that there was no substantial evidence pro-
203 duced in said cause supporting or tending to support said findings.

IX.

That the trial court erred in making and finding that portion of No. III of said findings of fact and conclusions of law wherein it is found that the accident and collision referred to in said findings "was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of the fellow-servant or fellow-servants the negligence of which said defendant through its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damage," for the reason and on the ground that there was no substantial evidence produced in said cause showing or tending to show that defendant through its train dispatcher was guilty of or chargeable with any negligence or carelessness which directly or proximately caused or contributed to cause said collision, injuries and damages or any part thereof.

X.

That the trial court erred in making and finding No. IV of its said findings of fact, for the reason and on the ground that there was no substantial evidence produced in said cause supporting or tending to support said findings or any part thereof.

XI.

That the trial court erred in refusing to find or adopt the finding or declaration of law proposed and requested by counsel for defendant as follows:

204 "That there was no evidence produced in this cause showing or tending to show that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint."

XII.

That the trial court erred in refusing to find or adopt the findings or declaration of law proposed and requested by counsel for defendant in words as follows:

"That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant."

XIII.

That the trial Court erred in overruling and denying the motion for nonsuit made by counsel for defendant at the close of all the

G.E. Butters W.J. Chapman
Ref Moore From 12 mn To 8 am
R.A. Starkmann " 8 am " 4 pm
H.H. Moon " 4 pm " 12 mn

CHIEF DISPATCHERS

DISPATCHERS

| | | |

(Form 1544 B Special)

# Santa Fe Pacific Railroad Company -- Arizona Division - 4th District

## TRAIN RECORD

WEST BOUND

EAST BOUND

| SYMBOL | | | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| TRAIN | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CONDUCTOR | Sra Bryant | Sra Bankhead | Sra Clark | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | | Sra Bankhead | |
| ENGINEMAN | J Hopkins | C.H. Terrell | Yager | | Ambrose | | O'Neill | | C Peterson | | W Evans | | P Peterson | | Cam | | Bankhead | | J Schaller | | McGuire | | Higgins | | | |
| ENGINE | H 42 | 311 | 2351 | | 376 | | 772 | | 364 | | 707 | | 383 | | 372 | | 311 | | 373 | | 201 | | 1182 | | | |
| SELIGMAN 57 | | | am 836 | | | | | | | | am 235 | 10 | am n34 | 1273 | | | | | pm 305 | 6 | pm 235 | 8 | am 125 | | | |
| CHINO 70 | | | am | | | | | | | | | | | | | | | | | | | | | | | |
| AUBREY 72 | | | | 650 | 45 | | | | | | | | | | | | | | | | | | | | | |
| PICACHO 53 | | | | 753 | | | | | | | | | | | | | | | 326 | 6 | 258 | 8 | | | | |
| YAMPAI 78 | | | | 845 | | | | | | | 350 | | 255 | 39 | | | | | | | | | | | | |
| NELSON 64 | | | | 848 | | | | | am 310 | 2 | 355 | | 305 | | | | | | 400 | 6 | 328 | 8 | 232 | 5 | | |
| PEACH SPGS 57 | | | | 925 | | | | | 340 | | 500 | | 335 | | | | | | 430 | 6 | 350 | | 254 | 5 | | |
| CHEROKEE 63 | | | | 1005 | | | | | 404 | | 510 | | 405 | | | | | | | | 352 | 8 | 258 | | | |
| TRUXTON 35 | | | | 1235 | | | | | am | | | | | | | | | | 458 | 6 | 420 | 8 | | | | |
| CROZIER 77 | | | | 1240 | | | | | 600 | | | | 630 | | | | | | 509 | 6 | 435 | | | | | |
| HACKBERRY 61 | | | | 105 | | | | | 630 | | 750 | | 945 | | | | | | 13 | 6 | 440 | 8 | 335 | 5 | | |
| ANTARES 61 | | | | 115 | | | | | | | am | | | | | | | | | | | | | | | |
| HUALAPAI 88 | | | | | | | | | | | | | | | | | | | | | | | | | | |
| BERRY 65 | | | | 220 | | | am | | 735 | | 715 | | 1120 | | am 1035 | | | | 624 | 6 | 540 | 8 | 421 | 5 | | |
| KINGMAN 43 | | | | 250 | | | | | 900 | | 915 | | 1200 | | 1055 | | | | | | | | 431 | | | |
| MACONNICO 30 | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HANCOCK 33 | | | | 317 | | | 706 | | 938 | | 943 | | 1240 | | | | | | 644 | 6 | 555 | 8 | | | | |
| DRAKE 41 | | | | 323 | | | | | | | | | 157 | | | | | | | | | | | | | |
| KASTER 40 | | | | | | | | | | | | | | | | | | | | | | | | | | |
| SIGNAL 52 | | | | 448 | | | 725 | | 1015 | | 1030 | | 230 | | | | | | 700 | 6 | 618 | 8 | 455 | 5 | | |
| YUCCA 58 | | | | 453 | | | 727 | | 200 | | 1035 | | 337 | | | | | | 603 | | | | | | | |
| HAVILAND 70 | | am 930 at wreck | | 525 | | | 800 at wreck | | 352 | | 1110 at wreck | | 506 | | | | | | 127 | 6 | 640 | 8 | am | | | |
| FRANCONIA 68 | | 1010 am | | 612 | | | am | | 354 | | am | | 510 | | | | | | | | | | | | | |
| | | | | 650 | | | | | 1440 | | | | 553 | | | | | | 555 | 6 | 705 | 8 | | | | |
| MULLEN 51 | | 1025 | | 725 | | | | | | | | | | | | | | | 557 | | 706 | | | | | |
| BEAL 68 | | 1110 6 am | | 850 | 2 | 44 | | | 510 | 37 | | | 635 | 40 | | | | | 832 | 6 | 730 | 8 | | | | |
| NEEDLES | | | | pm 876 | | 918 | | | pm 710 | | | | pm 1145 | P | | | | | pm | | pm | | | | | |
| CALLED FOR | | | | | | | | | | | | | 1273 | | | | | | | | | | | | | |
| TONNAGE | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CONSISTS | | Relief | | 46 | | 918 | | | 38 | | 1210 | | 40 | | | | | | | | | | | | | |
| | | | | | | | | | | | | | 1317 | | | | | | | | | | | | | |

Transferred from old Clerk

After section men

Wreck

Wreck

Wreck

EAST BOUND

Time Table No 16

Needles Wednesday Nov 20th 1907

DELAYS.

3/3 N fm 1 H 50" power & for Conde to Cheat up
Spence 26 403 Hancock 1hr 10m Aubrey 38. No1 and No7
Pocahontas 30. 1/2 - up 45 - 2/2 Orr
Aubrey 30. for 2/2
Foote 4 fm 35. 2/3 383 West Powell 40. 1/2 35
3/3 HB 25 Orr Rt 403 8 Berry 20 403 Hr 1 H 10 had 47" to make Jo but failed
Jo HB Call 2 H 50"
Jo 20' beg in 1hr Get out cars and Ex 772 Powell 30. meet Ex 383 and 1/35 Ju 3 1/2 meet No7 Finigan 1hr 20. pick up and Tie out cars water and Supper
Berry 10. meet 1/33. HB 3 hrs oil and watching 33 and No3 Foote

555

Time Table No 16

Needles Wednesday Nov 20th 1901

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
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| | | | | | | | | | |
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(Endorsement on back of original)

1027

Holmes

Santa Fe Pacific R.R. Co.

Plaintiffs Exhibit No. 5

Goldschmidt
Santa Fe Pac. R.Co. } 1049

Plaintiffs' Exhibit 6

evidence in said cause and before the argument and final submission of said cause; said motion being made upon the following grounds:

"1. That the evidence failed to show or establish any cause of action in favor of the plaintiff and against defendant; and

2. That the evidence showed plaintiff was injured by the negligence of his fellow-servants."

205 XIV.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Interrogatory No. 5. Did the operator at Yucca, Arizona, telegraph you anything as to the passage of Train No. 3 through Yucca on that morning"?

"Answer to interrogatory No. 5. I answer, yes, he did."

XV.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Interrogatory No. 6. If you answer interrogatory No. 5 in the affirmative, state what it was that he telegraphed you, and at what time did you receive the telegram or telegrams."

"To direct interrogatory No. 6 I answer: I received the message at about 4:58 o'clock A. M. that train No. 3 had passed there at 4:55 A. M. This is my recollection in the matter."

206 XVI.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Interrogatory No. 7. Did you or did you not make the figures 4:55 opposite the word 'Yucca' on the train sheet you were using that morning"?

"To direct interrogatory No. 7 I answer: I did."

XVII.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore,

and in permitting to be read in evidence over the objections of d
fendant the answer made by said Moore to said question; said que
tion and answer were in words and figures as follows:

"Direct interrogatory No. 8. If you did not, state who did,
you know. To direct interrogatory No. 8 I answer: I did
myself."

XVIII.

The trial court erred in overruling defendant's objections to t
following question propounded by counsel for plaintiff to t
207 witness Edward L. Moore upon the taking of the depositi
of said Moore, and in permitting to be read in evidencee ov
the objections of defendant the answer made by said Moore to sa
question; said question and answer were in words and figures
follows:

"Direct interrogatory No. 9. At what time were the figures 4:
placed opposite the word 'Yucca' written on that train sheet, a
why"?

"To direct interrogatory No. 9 I answer: They were placed the
about 4:58 or 4:59 A. M. on November 20, 1901, and I placed the
there because the operator at Yucca reported the train by there
4:55."

XIX.

The trial court erred in overruling defendant's objections to t
following question propounded by counsel for plaintiff to the witn
Edward L. Moore upon the taking of the deposition of said Moo
and in permitting to be read in evidence over the objections of d
fendant the answer made by said Moore to said question; said que
tion and answer were in words and figures as follows:

"Interrogatory No. 10. State whether or not you ever wrote t
figure '7' opposite the word 'Yucca' on the train sheet? To dire
interrogatory No. 10 I answer: I did write it."

XX.

The trial court erred in overruling defendant's objections to t
following question propounded by counsel for plaintiff to the witn
Edward L. Moore upon the taking of the deposition of said Moo
and in permitting to be read in evidence over the objectio
208 of defendant the answer made by said Moore to said que
tion; said question and answer were in words and figures
follows:

"Direct interrogatory No. 11. If you answer interrogatory No.
in the negative, do you know who did? To direct interrogatory N
11 I answer: I did it myself."

XXI.

The trial court erred in overruling defendant's objections to t
following question propounded by counsel for plaintiff to the witn
Edward L. Moore upon the taking of the deposition of said Moo

and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Direct interrogatory No. 12. If you answer interrogatory No. 11 in the affirmative state who wrote the figure '7' opposite the word 'Yucca' on the train sheet of November 20th, 1901, in the column devoted to train No. 3? To direct interrogatory No. 12 I answer: I did it myself."

## XXII.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question;
209 said question and answer were in words and figures as follows:

"Direct interrogatory No. 13. Do you know when the figure '7' was placed in the column devoted to train No. 3 on the train sheet of defendant of the morning of November 20th, 1901? To direct interrogatory No. 13 I answer: As near as I can remember it was between 4:55 and 4:59 on that morning."

## XXIII.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Direct Interrogatory No. 14. If you answer in the affirmative state when it was. To direct interrogatory No. 14 I answer: I have answered this in preceding answer, and will say that so far as I can remember it was a few seconds after the accident occurred."

## XXIV.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question;
210 said question and answer were in words and figures as follows:

"Direct Interrogatory No. 15. State circumstantially and in detail all you know regarding the writing of the figures 4:55 and 4:57 in the column devoted to train No. 3 opposite the word 'Yucca' on that train sheet of defendant company of November 20th, 1902? To direct interrogatory No. 15 I answer: I have stated that I placed those figures there myself, and I wrote them. I wrote the 4:55 just before the accident, and placed a '7' over the second 5 just after."

XXV.

The trial court erred in overruling defendant's objections to the following question propounded by counsel for plaintiff to the witness Edward L. Moore upon the taking of the deposition of said Moore, and in permitting to be read in evidence over the objections of defendant the answer made by said Moore to said question; said question and answer were in words and figures as follows:

"Direct Interrogatory No. 17. Why does the said train sheet fail to show the time that train No. 3 passed through Franconia on said morning? To direct interrogatory No. 17 I answer: During the conversation which I had with the operator at Franconia the collision occurred, and on account of the excitement I failed to place the time on the sheet."

XXVI.

The trial court erred in overruling defendant's objections to and in receiving in evidence over defendant's objections the document received in evidence and marked Plaintiff's Exhibit No. 5, said document being attached to and made a part of defendant's bill of exceptions in said cause.

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XXVII.

The trial court erred in overruling defendant's objections to, and in receiving in evidence over defendant's objections, the document received in evidence and marked Plaintiff's Exhibit No. 5, said document being a memorandum sheet known as a train sheet used in defendant's train dispatcher's office on the day of the happening of the collision in question in this action, and upon which various entries were made while the same was in use as aforesaid by defendant's train dispatchers, purporting to give a general description of the several trains and engines operated over the division of defendant's railroad in question on said day, and also the names of the agents in charge thereof, and also purporting to show the time at which each of the trains running over said division on said day passed each of the telegraph stations along the line of said division, and purporting to show the time at which each of the colliding trains in question in this cause passed certain stations along the line of their respective runs on said division on said day.

XXVIII.

The trial court erred in overruling the first ground of the demurrer interposed by defendant to the complaint in this cause, and by adjudging and deciding that said complaint stated facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

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XXIX.

The trial court erred in overruling the second and third grounds of said demurrer, and by adjudging and deciding that said complaint was sufficiently certain and definite and was unambiguous.

T. J. NORTON,
E. E. MILLIKIN,
*Attorneys for Defendant.*

[Endorsed:] No. 1027. U. S. Circuit Court, 9th Circuit, Southern District of California, Southern Division. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. Assignment of Errors. Filed Mar. 28, 1904. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. T. J. Norton, E. E. Millikin, Paul Burks, 516 Conservative Life Building, Los Angeles, Cal. Telephone Main 1466. Attorneys for Deft.

213 In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,

*vs.*

SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Order Allowing Writ of Error.*

On this 28th day of March, 1904, came the defendant by its attorneys and filed herein and presented to the Courts its petition praying for the allowance of a writ of error intended to be urged by it, praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $15,000 which shall operate as a supersedeas bond.

214 And it is ordered that said petition be and the same is hereby allowed and granted, and that the writ of error be allowed in said cause returnable before the United States Circuit Court of Appeals for the Ninth Circuit on the 26th day of April, 1904, and that a transcript of the record and of all the proceedings and papers on which the judgment was made and entered in this cause shall be made and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the undertaking in the sum of $15,000, tendered by said defendant, be and the same is hereby approved as the undertaking on writ of error herein.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1027. U. S. Circuit Court, 9th Circuit, Southern District of California, Southern Division. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. Order Allowing Writ of Error. Filed Mar. 28, 1904. Wm. M. Van Dyke, Clerk. T. J. Norton, E. E. Millikin, Paul Burks, 516 Conservative Life Building, Los Angeles, Cal. Telephone Main 1466. Attorneys for Deft.

215 In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Bond on Writ of Error.*

Know all men by these presents, that we, the Santa Fe Pacific Railroad Company, a corporation, created by an act of Congress approved March 3, 1897, as principal, and J. A. Graves and W. C. Patterson, as sureties, are held and firmly bound unto Laurete Holmes, plaintiff above named, in the sum of fifteen thousand dollars ($15,000), to be paid to said Laurete Holmes, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 28th day of March, 1904.

Whereas, the above-named defendant, the Santa Fe Pacific Railroad Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the
216 judgment in the above-entitled cause made and entered in favor of said plaintiff and against said defendant on or about the third day of February, 1904, by the Circuit Court of the United States, for the Southern District of California, Southern Division.

Now therefore, the condition of this obligation is such that if the above-named Santa Fe Pacific Railroad Company shall prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void: otherwise to remain in full force and virtue.

THE SANTA FE PACIFIC RAILROAD COMPANY,
By G. HOLTERHOFF, *Its Treasurer, Principal*
J. A. GRAVES,
W. C. PATTERSON, *Sureties.*

STATE OF CALIFORNIA, *County of Los Angeles, ss:*

J. A. Graves and W. C. Patterson, the sureties named in and who subscribed the foregoing undertaking on appeal, being first duly sworn, each for himself says:

That he is a resident of and freeholder within the county
217 of Los Angeles, State of California, and within the Ninth Circuit of the Circuit Court of the United States, Southern District of California, Southern Division, and that he is worth the amount specified in said undertaking as the penalty thereof over

and above all his just debts and liabilities, exclusive of property exempt from execution.

W. C. PATTERSON
J. A. GRAVES.

Subscribed and sworn to before me this 28th day of March, 1904
[SEAL.] E. M. ASTBURY,
*Notary Public in and for the County of Los Angeles, State of California.*

The foregoing bond and the sufficiency of the sureties named therein is hereby approved this 28th day of March, 1904.
OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1027. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Laurete Holmes, Plaintiff, *vs.* Santa Fe Pacific Railroad Company, Defendant. (Original) Bond. Filed Mar. 28, 1904. Wm. M. Van Dyke, Clerk. T. J. Norton, E. E. Millikin, Paul Burks, 516 Conservative Life Building, Los Angeles, Cal. Telephone, Main 1466. Attorneys for Defendant.

218 In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1027.

LAURETE HOLMES, Plaintiff,
*vs.*
SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Defendant.

*Clerk's Certificate to Transcript.*

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing one hundred and seventy-nine (179) type-written pages, numbered from 1 to 179 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the record, pleadings, conclusions of the court, bill of exceptions, assignment of errors and of all proceedings and papers upon which the judgment was rendered in the above and therein entitled cause, excepting therefrom Plaintiffs' Original Exhibit No. 5, being train sheet or record of the Santa Fe Pacific Railroad Company, Arizona Division, 4th District, for Wednesday,
219 Nov. 20th, 1901, which said original exhibit is by order of Court attached hereto and made a part hereof, and that the same together constitute the return to the annexed writ of error.

I do further certify that the cost of the foregoing record is $106.20, and that the amount thereof has been paid me by the Santa Fe

Pacific Railroad Company, a corporation, the plaintiff in error in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 24th day of May, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[SEAL] WM. M. VAN DYKE,

*Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.*

[Endorsed:] No. 1084. United States Circuit Court of Appeals for the Ninth Circuit. Santa Fe Pacific Railroad Company (a Corporation), Plaintiff in Error, *vs.* Laurete Holmes, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Southern District of California. Filed May 31, 1904. F. D. Monckton, Clerk.

220 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1084.

SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Plaintiff in Error,

*vs.*

LAURETE HOLMES, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and nineteen (219) pages, numbered from one (1) to two hundred and nineteen (219), inclusive, including the index and covers thereto, to be a true copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Southern District of California in the above-entitled case, and that the same was printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 15th day of March, A. D. 1905.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

221 At a stated term, to wit: the October term, A. D. 1904, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San

Francisco, on Monday, the third day of October, in the year of our Lord one thousand, nine hundred and four.

Present: the Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1084.

THE SANTA FE PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*v.*
LAURETE HOLMES, Defendant in Error.

*Order of Submission.*

Upon motion of Mr. Alfred Sutro, on behalf of counsel for the respective parties, and upon the filing of a stipulation of counsel for the respective parties therefor, ordered, cause submitted to the Court for consideration and decision on briefs.

Thereupon, it was ordered that a brief filed by Mr. Byron Waters be considered, notwithstanding the fact that Mr. Waters is not a member of the bar of the court.

222 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1084.

SANTA FE PACIFIC RAILROAD COMPANY (a Corporation), Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Opinion U. S. Circuit Court of Appeals.*

T. J. Norton, E. E. Millikin and J. Wade McDonald, for Plaintiff in Error.

Waters & Wylie, for Defendant in Error.

Before Gilbert, Ross and Morrow, Circuit Judges.

The defendant in error brought an action to recover damages for personal injuries sustained while he was in the employment of the plaintiff in error as locomotive engineer, in a head-on collision between a limited passenger train west bound, known as Train No 3, and a passenger train east bound, known as Train No. 4, on which the defendant in error was on duty as an engineer. He claimed that the collision and his injuries were caused by the negligence of a train dispatcher of the plaintiff in error. The train dispatching office was at Needles and its jurisdiction extended eastward from Needles to Seligman, Arizona, as well as over the division westward from Needles. The office was in charge of two chief dis-
223 patchers and six assistants, three of the latter being assigned to each division. Assistant Dispatcher E. L. Moore was on

duty and in charge of the work on the Arizona Division at and before the time of the collision. On Nov. 20, 1901, at 4:22 o'clock in the morning, Train No. 3, westbound, and about two hours late, was at Kingman, and Train No. 4, eastbound, and about twenty-two minutes late, was at Needles. Both trains were run on regular schedule or time cards when on time or but slightly delayed. On account of the unusual delay of Train No. 3 on that morning, it became necessary to issue special orders for the operation of both trains over the Arizona division. At 4:12 A. M. Train Dispatcher Moore promulgated a special order No. 22 in words as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 & 450 to Needles but will run 1 (one) hour & 50 mins. late Kingman to Needles." Copies of this order were sent to Kingman and Needles and were delivered to Train No. 4 before 4:22 A. M. and to the train of No. 3 upon her arrival at Kingman at 4:21 or 4:22. At 4:22 Train No. 4 departed from Needles and ran east to Mellen, a distance of 11.9 miles, arriving there some time between 4:42 and 4:45, and stopped there upon a signal that there were orders to be delivered to it. At 4:21, it being apparent that No. 3 was more delayed in arriving at Kingman than had been expected, Train Dispatcher Moore promulgated special order No. 23 as follows: "No. 3 eng. 482 will run two (2) hours late Kingman to Needles." Copies of this order were sent to Kingman, and were delivered to No. 3 at the same time that Order No. 22 was delivered to Train No. 4 on its arrival at Mellen. The effect of these orders when taken with the general rules of the company was that No. 3 was to be run in accordance with the time card except that it was to run two hours behind the scheduled time and was to have the right of track over the other train, and Train
224 No. 4 was to look out for No. 3 and run with reference to its movement as provided for by the special orders in connection with the time table. These orders and the time table would have made Franconia the probable place of passing of the trains. The crew of No. 4 left Mellen with the intention of running to Franconia and there going upon the siding. Train No. 3 left Kingman at 4:31 six minutes late according to its schedule as provided by the special order No. 23 and the time card. Yucca, which was 23.9 miles west of Kingman and 12.8 miles east of Franconia was the only night telegraph office between those two points. Train No. 3 according to the special order No. 23 and the time card should have passed Yucca at 4:57. It passed there at 4:55 or two minutes ahead of its schedule time. At 4:58 or 4:59 the local telegraph operator at Yucca reported to the train dispatcher Moore that No. 3 passed Yucca at 4:55. Train No. 4 left Mellen, which was the only night telegraph office between Needles and Franconia, between 4:45 and 4:47 and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop of three or four minutes was made there for the purpose of adjusting the flow of fuel oil in one of the locomotives, and the train then proceeded toward Franconia. In the meantime Train No. 3 arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. The engineer on approaching that station, whistled his signal to inquire if there

were any orders there for his train and received by semaphore signal from the operator the reply: "No orders from the train dispatcher." He went on his way without stopping at Franconia and while going at a speed of from sixty to seventy miles an hour, at about 1¼ miles from Franconia, collided with Train No. 4, which was running at a speed of from forty to fifty miles an hour. Both trains were wrecked, a number of persons were killed, and
225 several others, including the defendant in error, sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. The defendant in error but for the collision could have reached and placed Train No. 4 on the siding at Franconia station two or three minutes before Train No. 3 was due there. The plaintiff in error's rule No. 385 only requires the train not having the right of track to take a siding and be clear of the main track before the leaving time of the opposing train. The plaintiff in error answered the complainant denying that it was negligent, and alleging that the injuries received by the defendant in error were the result of his own negligence and carelessness and that of his fellow servants and co-employees. The case, by the stipulation of the parties was tried before the court without a jury, and the court found that the train dispatcher Moore was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and trains from colliding and in failing to give proper orders as to the movements of one of said engines and trains. Judgment was entered for the defendant in error in the sum of $9,000 with costs.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is the contention of the plaintiff in error that the orders given by the train dispatcher, together with the regular time schedules and the rules and regulations of the company, known and understood by the crew of both trains, were sufficient, if observed, to have ensured the safety of all concerned, and that the accident was the result of the failure of Train No. 3 to observe said time schedule and rules and regulations in connection with the special orders, in that it passed Yucca two minutes ahead of time, and Franconia six minutes ahead of time, that there was no evidence to go to the jury tending to show negligence on the part of the plaintiff
226 in error and that its motion for non-suit should have been granted by the court. It is argued that although the train dispatcher was advised that Train No. 3 had passed Yucca two minutes ahead of its passing time for that station, the circumstances did not make it his duty to send additional orders to that train, he having previously promulgated orders sufficient to have ensured the safe operation of both trains had such orders been obeyed, and that having once given proper and sufficient orders in the premises, the duty of the master to the employe had been fulfilled; and further, that the violation of the orders by the conductor and engineer of Train No. 3 was an act, not of the plaintiff in error, but of the fellow servants of the defendant in error for which the former is not liable. It is assigned as error that the trial court erred in holding that it

was the imperative duty of the Railroad Company to have attempted to enforce obedience to order No. 23 by ordering Train No. 3 to stop at Franconia. The findings of fact of the trial court must stand as the verdict of a jury if there was any evidence whatever to sustain them. We cannot say on examining the evidence in the bill of exceptions that there was no evidence of negligence on the part of the plaintiff in error. The trial court found that Train No. 3 which should have passed Yucca at 4:57 did so at 4:55 and that Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and was of the opinion that in failing to so act he was negligent. Under the circumstances it would seem that ordinary prudence required of the train dispatcher that he fix a point of meeting of the trains, but whatever may have been his duty in that regard, we think there was evidence of his negligence in the fact that after he was advised that Train No. 3 passed Yucca two minutes ahead of its time and was running in violation of his
227 orders, he failed to send orders to have that train stopped at Franconia. He had 12 or 13 minutes within which to make that order. He knew that No. 3 was running in advance of its schedule time, whether because of willful violation of the rules and orders or because on the down grade track by these stations it had become uncontrollable, or because the engineer's watch was running slow, and he must have known that if such violation of orders continued there would probably be a collision. The engineer of Train No. 3 testified that according to his watch he left both Yucca and Franconia on schedule time and according to the orders. It may be that the error of the train dispatcher in not sending special orders to Franconia was induced by his own negligent entries on his train sheet, a record which he kept of the progress by hour and minute of both of the trains. On that train sheet it appears that he had marked 5:45 and 5:47 as the time of the arrival and departure of Train No. 4 at Mellen, instead of the figures 4:45 and 4:47, which were the actual times at which that train arrived and left that station. The circumstances called for the exercise of the greatest care and diligence on the part of the plaintiff in error. It could not absolve itself from its duty by giving orders which if strictly complied with, would have ensured the safety of its employer. The duty was a continuing one, and called for the issuance of further orders as soon as it became apparent that a known failure to comply with orders already made was likely to, or might, result in disaster.

There was no error in holding the plaintiff in error accountable for the negligence of the train dispatcher. Northern Pacific Ry. Co. *v.* Dixon, 194 U. S. 338; Oregon Short Line *v.* Frost, 21 C. C. A. 186. In Northern Pacific Ry. Co. *v.* Mix, 57 C. C. A. 592, this court approved the instruction given by the trial court to the
228 jury in such a case as follows: "It is the duty of the defendant company to all operatives upon its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction, and to give such orders

as will insure the safe passage of the one by the other. With regard to the movement of trains, the train dispatcher stands in the place of the defendant."

The plaintiff in error challenges the jurisdiction of the Circuit Court and contends that the allegation of the complaint as to the organization and existence of the plaintiff in error is not sufficient to show that it was a corporation of the United States. That allegation is as follows: "That the defendant is now and at all times mentioned herein was a corporation organized and existing under the laws of the United States, having its principal place of business at and being a resident of Los Angeles, in the State of California." It is said that in order to show jurisdiction in the Circuit Court, the complaint should have contained the allegation that the plaintiff in error was created by and existed under a law of the United States and that it derives all its corporate powers and authority from such law, and that in the maintenance and operation of the railroad in question, it was exercising or claiming to exercise such powers and authority. We think that all this is necessarily implied in the undenied allegation of the complaint. If the plaintiff in error was organized and existed under the laws of the United States it could not have been organized or had its existence under other authority. It must have been a corporation of the United States, and as such, entitled to main-
229 tain the action in the Circuit Court. Pacific Railroad Removal Cases, 115 U. S. 1. The judgment of the Circuit Court is affirmed.

(Endorsed:) Opinion. Filed February 6, 1905. F. D. Monckton, Clerk.

230 *Judgment U. S. Circuit Court of Appeals.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1084.

THE SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of California, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and Entered Feb. 6, 1905. F. D. Monckton, Clerk.

231 United States Circuit Court of Appeals for the Ninth Circuit

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Petition for Writ of Error.*

The above named plaintiff in error, Santa Fe Pacific Railroad Company, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a judgment has therein been rendered on the 6th day of February, 1905, affirming a judgment of the Circuit Court of the United States, Ninth Circuit, for the Southern District of California, Southern Division, in favor of said defendant in error Laurete Holmes, and against said Santa Fe Pacific Railroad Company, for the sum of Nine thousand dollars ($9,000) and costs, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, said Santa Fe Pacific Railroad Company prays that a writ of error may issue in this behalf to the Supreme Court of the United States, and that the clerk of said United States Court of Appeals, for the Ninth Circuit, be directed to send the record and proceedings of said cause with all things concerning the same to
232 the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

T. J. NORTON &
E. E. MILLIKIN,
*Attorneys for Plaintiff in Error.*

Allowed March 6th, 1905,
ERSKINE M. ROSS,
*U. S. Circuit Judge.*

(Endorsed:) Petition for Writ of Error. Filed Mar. 6, 1905. F. D. Monckton, Clerk.

233 United States Circuit Court of Appeals for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Assignment of Errors.*

And now comes said plaintiff in error, Santa Fe Pacific Railroad Company, and say that in the record herein there is manifest error, and that the United States Circuit Court of Appeals, for the Ninth Circuit, erred in this to-wit:

I.

In holding and deciding that the complaint in said cause stated a case within the original jurisdiction of the trial court.

II.

In holding and deciding that, notwithstanding there was no allegation or evidence of negligence on the part of plaintiff in error in respect to either the employment or retention of either of the agents or servants in any manner engaged in the handling or operation of either of the trains in question; and, notwithstanding a plan and order proper and sufficient to secure the safe operation of said trains had been provided, promulgated and brought to the notice of all said agents and servants, plaintiff in error still owed the duty to
234 his agents and servants employed on each of said trains upon the occasion in question to exercise care and diligence to protect them, and each of them, against dangers of harm and injury arising solely on account of violations of said plan and orders on the part of the agents and servants employed on the other train.

III.

In holding and deciding that plaintiff in error in the operation and management of the opposing trains in question and, notwithstanding, a plan and orders proper and sufficient, if followed and complied with by the train crews, to secure the safety of the trains and crews had been provided, promulgated and brought to the notice of said crews, owed a continuing duty to its servants on each of said trains to exercise care and diligence to protect them, and each of them, against the negligent acts and omissions of its servants employed on the other train.

IV.

In holding and deciding that plaintiff in error, through its train dispatcher, or otherwise, was negligent either in respect to adequacy or sufficiency of the orders, or either of them, issued and delivered

to the crews in charge of the trains in question, or in respect to i
failure thereafter to issue and deliver further or additional orders
directions to the crew in charge of either of said trains.

V.

In holding and deciding that plaintiff in error, upon notice to
train dispatcher of a violation of orders promulgated to govern t
movement of the trains in question on the part of the crew in char
of train No. 3, which, if continued, would endanger the safety of t
crew in charge of train No. 4, was bound to exercise care and di
gence to protect the crew of train No. 4 against such danger,
possibility of danger.

235 IV.

In holding and deciding that there was any substantial eviden
produced in said cause supporting or tending to support the findi
of fact made by the trial court to the effect that the accident a
collision in question in this cause resulted by reason of any neg
gence or want of care on the part of plaintiff in error through
train dispatcher, or otherwise.

VII.

In holding and deciding that there was any substantial evide
in the case tending to support that portion of the findings of fa
made by the trial court, wherein it was found that the accident a
collision in question in this case "was caused wholly by negligen
"and carelessness of the defendant through its train dispatcher,
"gether with the negligence and carelessness of a fellow servant
"fellow servants, the negligence of each said defendant through
"train dispatcher, a fellow servant or fellow servants, proximat
"contributing to the aforesaid collision, injuries and damage."

VIII.

In holding and deciding that the findings of fact made by s
trial court were sufficient to sustain either of the conclusions of l
made by said trial court, or the judgment entered thereon; and
over-ruling each of the following specifications or insufficiency
said findings of fact made on behalf of plaintiff in error, v
236 1. The facts found are insufficient to show that the neg
gence or want of care mentioned in said findings on the p
of plaintiff in error's train dispatcher amounted to a violation of a
duty owing from the plaintiff in error to the defendant in error un
or by virtue of the relation of employer and employe or the contr
of employment existing between defendant in error and plaintiff
error and mentioned in said complaint.

2. That the facts found are insufficient to show that the negligen
or want of care on the part of plaintiff in error's train dispatch
mentioned in said findings was in violation of any duty owing fr
plaintiff in error to defendant in error by reason of the relation

contract aforesaid, the performance of which duty had been delegated by plaintiff in error to said train dispatcher.

3. The findings do not show but what said negligence and want of care on the part of plaintiff in error's train dispatcher was the negligence of a fellow-servant or co-employe of defendant in error.

4. The findings are insufficient to show that plaintiff in error's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid.

5. The findings are insufficient to show that plaintiff in error's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid, the performance and discharge of which had been delegated by plaintiff in error to said train dispatcher.

VIII.

In holding and deciding that the trial court properly refused to find or adopt the finding or declaration of law proposed and requested on the part of plaintiff in error, as follows:

"That there was no evidence produced in this cause showing or tending to show that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint."

237 IX.

In holding and deciding that the trial court properly refused to find or adopt the finding or declaration of law proposed and requested on behalf of the plaintiff in error, as follows:

"That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant."

X.

In holding and deciding that the trial court properly over-ruled and denied the motion for non-suit made on behalf of plaintiff in error, and at the close of all the evidence, but before the final submission of said cause; said motion being made upon the following grounds:

1. That the evidence failed to show or establish any cause of action in favor of the plaintiff and against defendant; and

2. That the evidence showed plaintiff was injured by the negligence of his fellow servants.

Wherefore, said plaintiff in error prays that said judgment may be reversed in all things.

T. J. NORTON &
E. E. MILLIKIN,
*Attorneys for Plaintiff in Error.*

(Endorsed:) Assignment of Errors. Filed March 6, 1905. F. D. Monckton, Clerk.

238 United States Circuit Court of Appeals for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Order.*

On this 6th day of March, 1905 came plaintiff in error, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it, praying also that a transcript of the records and proceedings and papers in said cause, duly authenicated may be sent to the Supreme a Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, said writ of error is allowed, upon said plaintiff in error giving bond according to law in the sum of Fifteen thousand dollars ($15,000), which shall operate as a supersedeas bond.

And it is further ordered that said petition be, and the same is, hereby allowed and granted, and that the writ of error be allowed in said cause returnable before the United States Supreme Court on the 5th day of May, 1905, and that the clerk of this court
239 sign and seal the writ, and that a transcript of the records and of all the proceedings and papers in said cause shall be made and transmitted to the said United States Supreme Court.

It is further ordered, that the undertaking in the sum of Fifteen thousand dollars ($15,000) tendered by said plaintiff be, and the same is, hereby approved as the undertaking on writ of error herein.

ERSKINE M. ROSS,
*Judge United States Circuit Court of Appeals, Ninth Circuit.*

(Endorsed:) Order Allowing Writ etc. Filed March 6, 1905. F. D. Monckton, Clerk.

240 *Bond.*

United States Circuit Court of Appeals for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

Know all men by these presents: That we, the Santa Fe Pacific Railroad Company, a corporation, as principal, and The United

States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, and duly authorized and empowered to make guaranty and become surety upon bonds and undertakings required by law, as surety, are held and firmly bound unto Laurete Holmes above named in the sum of Fifteen thousand ($15,000) Dollars to be paid to said Laurete Holmes, his heirs, representatives or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Signed, executed and dated, this 6th day of March, 1905.

Whereas, the above named plaintiff in error, Santa Fe Pacific Railroad Company, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment of said United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause made and entered on the 6th day of February, 1905, affirming a judgment in the above entitled cause for the sum of Nine thousand ($9,000) Dollars and costs made and entered in
241 favor of said defendant in error and against said plaintiff in error on or about the 3rd day of February, 1904, by the Circuit Court of the United States for the Southern District of California, Southern Division.

Now, therefore, The Condition of this obligation is such that if the above named Santa Fe Pacific Railroad Company shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

SANTA FE PACIFIC RAILROAD COMPANY,
By THOMAS J. NORTON, *Its Attorney.*
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN H. ROBERTSON, *Its Attorney in Fact.*

The foregoing bond is approved this 6th day of March, 1905.

ERSKINE M. ROSS,
*U. S. Circuit Judge.*

(Endorsed:) Bond. Filed March 6, 1905. F. D. Monckton, Clerk.

242 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1084.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
*vs.*
LAURETE HOLMES, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-three (23) pages, numbered from one (1) to twenty-three

(23), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled cause in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Southern District of California, constitute a true copy of the printed record upon which the above-entitled cause was heard in the said Circuit Court of Appeals and of all proceedings had therein, and the transcript of record upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 15th day of March, A. D. 1905.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

243 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court of Appeals, before you or some of you, between the Santa Fe Pacific Railroad Company, a corporation, plaintiff in error, and Laurete Holmes, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings, aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, District of Columbia, on the fifth (5th) day of May, 1905, that the record and proceedings, aforesaid, being inspected said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

244 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of March, in the Year of Our Lord, One thousand nine hundred and five.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*

Allowed by—
ERSKINE M. ROSS,
*Judge of the United States Circuit Court of Appeals for the Ninth Circuit.*

245 *Return to Writ of Error.*

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been lodged for the within named defendant in error.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By the Court:

F. D. MONCKTON, *Clerk.*

[Endorsed:] 1084. U. S. Circuit Court of Appeals for the Ninth Circuit. Santa Fe Pacific Railroad Co., Plff. in Error, *v.* Laurete Holmes, Deft. in Error. Writ of Error. Filed Mar. 6 1905 F. D. Monckton, Clerk.

246 United States Circuit Court of Appeals for the Ninth Circuit.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,

*vs.*

LAURETE HOLMES, Defendant in Error.

*Citation.*

The United States of America, Ninth Circuit.

To Laurete Holmes:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, 60 days after the date of this citation, pursuant to a writ of error allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the Santa Fe Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

247 Witness, the Honorable Erskine M. Ross, Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 6th day of March, A. D., 1905.

ERSKINE M. ROSS,

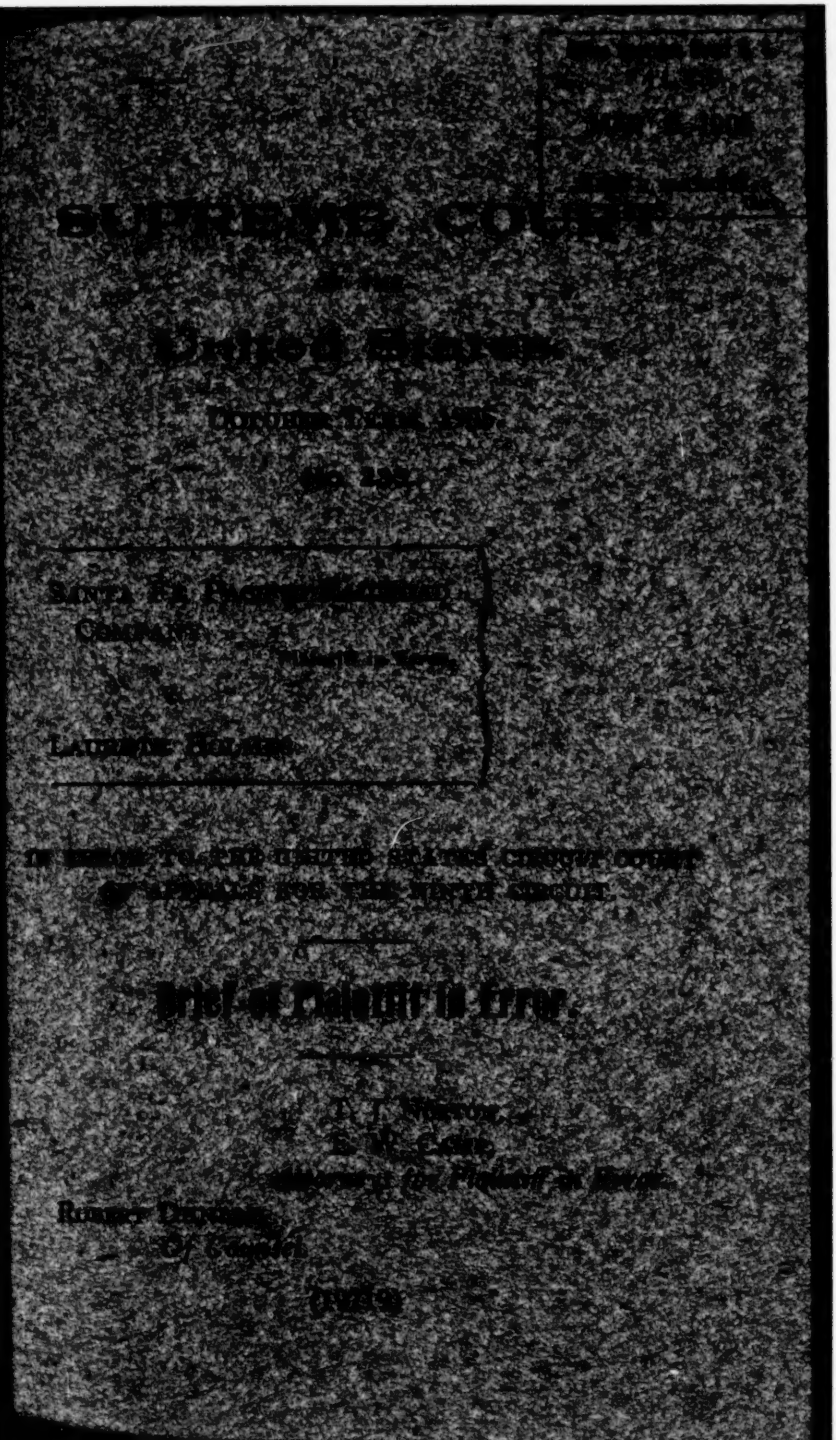
*Judge of the U. S. Circuit Court of Appeals, Ninth Circuit.*

Service of foregoing Citation and also of Writ of Error mentioned therein admitted this 8th day of March, 1905.

BYRON WALTERS,
WIN WYLIE,
*Attorneys for Defendant in Error.*

248 [Endorsed:] 1084. U. S. Circuit Court of Appeals for the Ninth Circuit. Santa Fe Pacific Railroad Co., Plff. in Error, *v.* Laurete Holmes, Dft. in Error. Citation. Filed March 11, 1905. F. D. Monckton, Clerk.

Endorsed on cover: File No. 19,719. U. S. Circuit Court Appeals, 9th Circuit Term No. 235. Santa Fe Pacific Railroad Company, Plaintiff in Error, *vs.* Laurete Holmes. Filed April 19th, 1905. File No. 19,719.



(19719)

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

OCTOBER TERM, 1905.

NO. 235.

SANTA FE PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

v.

LAURETE HOLMES.

In Error to the United States Court of Appeals for the Ninth Circuit.

## BRIEF OF PLAINTIFF IN ERROR.

T. J. NORTON,
E. W. CAMP,
*Attorneys for Plaintiff in Error.*

ROBERT DUNLAP,
*Of Counsel.*

## STATEMENT OF THE CASE.

Judges and lawyers often remark that "personal injury" cases are increasing out of all proportion to other litigation. Reasons for this are the abolition by statute in some states of the fellow-servant rule, the refining away of that rule by the courts of other states, and finally the ingenuity of client and counsel in shaping and bending facts and circumstances so as to shift to the master's back the burden of a fellow-servant's negligence. Of this last, the present case is a striking example.

Plaintiff sued defendant as a federal corporation for damages sustained in a head end collision between two trains on one of which he was an engineer. He recovered a judgment, which was affirmed by the Circuit Court of Appeals, and this writ of error was thereupon sued out.

Plaintiff's train No. 4 was at Needles, California, eastbound, the other train, No. 3, approaching Kingman, Arizona, westbound, and a little more than two hours behind its schedule time (see map facing p. 58 of Transcript). Orders were given from division headquarters, at Needles, to each that No. 3 should have the right of way and run two hours behind its schedule.

Under these orders the trains moved toward each other. The engineers of No. 4 (which had

two engines) found that they could reach Franconia in time to take the siding before No. 3 would be due under the orders, and ran for that station; but No. 3 passed Franconia at high speed at 5:11, six minutes ahead of its time, and crashed into No. 4 a mile and a quarter west of that station between 5:12 and 5:13.

The action was tried without a jury pursuant to stipulation under section 649 of the Revised Statutes, and the court found that the injury was caused by the negligence of the plaintiff in error, holding that train No. 3 passed Yucca station, the next telegraph station east of Franconia, two minutes in advance of its time as fixed by the orders given; that the plaintiff in error was informed of this fact in time to have intercepted No. 3 at Franconia; that plaintiff in error ought to have so intercepted No. 3 with an order to stop at Franconia; and that its failure to do so was the cause of the collision and of the injury (Tr. pp. 13, 14, fols. 24, 25).

No complaint was or could be made of the condition of the roadbed or track, nor of the construction or condition of the colliding trains, both of which were limited passenger trains of the first class.

As soon as both parties had rested, plaintiff in error moved for a nonsuit on the grounds:

1. That the evidence failed to show or estab-

lish any cause of action in favor of the plaintiff and against defendant; and,

2. That the evidence showed that plaintiff was injured by the negligence of his fellow servants.

The motion was denied. (Tr. p. 57, fol. 111).

Before the findings were made or filed, plaintiff in error requested the court in writing to make a finding or declaration of law as follows:

> "That there was no evidence produced in this cause showing, or tending to show, that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause, or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint." (Tr. p. 57, fol. 112.)

And at the same time and manner requested the court to make a finding or declaration of law as follows:

> "That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant." (Tr. pp. 58, 112.)

Plaintiff in error also excepted to the findings made. (Tr., p. 58, fol. 113.)

The findings claimed to be erroneous are as follows:

III.

That the aforesaid collision * * * was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of a fellow-servant or fellow-servants, the negligence of each said defendant though its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damages.

IV.

That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders as to the movement of one of said engines and train. (Tr. pp. 13, 14 fols. 24,25.)

The evidence was preserved in a bill of exceptions so as to submit the question whether or not there was any evidence whatever to support the finding or justify the court's refusal to nonsuit and to find as requested. This we understand to be a matter of law reviewable upon this writ of error.

St. Louis v. Telegraph Co., 148 U. S. 92;
Lehnen v. Dickson, 148 U. S. 71;

Dooley v. Pease, 180 U. S. 126;
Am. Sales Book Co. v. Bullivant, 117 Fed. 255;
Wright v. Bragg, 96 Fed. 729;
Barnard v. Randall, 110 Fed. 906;
Kunkel v. Brown, 99 Fed. 593.

Plaintiff in error has the burden of showing that the finding of negligence on its part is wholly unsupported by any evidence on which such finding could be made. But to make out actionable negligence a finding of several facts was necessarily implied; and if anyone of those implied findings is wholly without evidence to support it, the finding of plaintiff's negligence is wholly without evidence on which to stand and plaintiff in error's motion for nonsuit should have been allowed and its request for findings or declarations should have been granted.

Plaintiff in error insisted and here insists:

First. That the orders given were sufficient, if obeyed, to insure the safe moving of both trains;

Second. That the plaintiff in error was not guilty of negligence in not giving a further order, because:

a. There is no evidence that Train No. 3 did pass Yucca ahead of its time;

b. There is no evidence that plaintiff in error

was informed that Train No. 3 passed Yucca ahead of its time;

c. Conceding that No. 3 did pass Yucca too soon, and that plaintiff in error knew of that fact, yet there is nothing to show that any duty was thereby imposed on plaintiff in error to issue a further order;

d. If any such duty was imposed, there is nothing to show that plaintiff in error was bound to issue such order as early as 5:11, at which time No. 3 passed Franconia.

Third. The findings do not support the judgment because it does not appear that the negligence of the dispatcher was that of plaintiff in error and not that of a fellow servant.

Fourth. Conceding that plaintiff in error was negligent, there is nothing to show that such negligence was the proximate cause of the injury.
jury.

In all these propositions except the third, we attack the findings on the ground that they are wholly unsupported by evidence.

## ASSIGNMENT OF ERRORS.

I.

That said Court erred in rendering the judgment made and entered in said cause for the reason that the findings of fact made by said Court in said cause do not sustain said judgment and are insufficient to justify said judgment.

II.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law.

III.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particulars, to wit:

1. The facts found are insufficient to show that the negligence or want of care mentioned in said findings on the part of plaintiff in error's train dispatcher amounted to a violation of any duty owing from the plaintiff in error to the defendant in error under or by virtue of the relation

of employer and employe or the contract of employment existing between defendant in error and plaintiff in error and mentioned in said complaint.

2. That the facts found are insufficient to show that the negligence or want of care on the part of plaintiff in error's train dispatcher mentioned in said findings was in violation of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid, the performance of which duty had been delegated by plaintiff in error to said train dispatcher.

3. The findings do not show but what said negligence and want of care on the part of plaintiff in error's train dispatcher was the negligence of a fellow-servant or co-employe of defendant in error.

4. The findings are insufficient to show that plaintiff in error's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid.

5. The findings are insufficient to show that plaintiff in errors said train dispatcher was guilty of any want or care of negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by

reason of the relation or contract aforesaid, the performance and discharge of which had been delegated by plaintiff in error to said train dispatcher.

IV.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particular, to wit:

That the facts found do not show but that the collision and each and all of the injuries complained of were solely caused by negligence, carelessness and want of care on the part of the fellow-servants and co-employes of defendant in error.

V.

That the trial court erred in making and rendering that portion of its findings of fact and conclusions of law wherein it is found that the accident and collision mentioned in said findings was caused or resulted by reason of negligence and want of care on the part of plaintiff in error through its train dispatcher; for the reason and on the ground that there was no substantial evidence produced in said cause supporting or tending to support said findings.

VI.

That the trial court erred in making and finding that portion of No. III of said findings of fact and conclusions of law wherein it is found that the accident and collision referred to in said findings "was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of the fellow-servant or fellow-servants, the negligence of which said defendant through its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damage," for the reason and on the ground that there was no substantial evidence produced in said cause showing or tending to show that plaintiff in error through its train dispatcher was guilty of or chargeable with any negligence or carelessness which directly or proximately caused or contributed to cause said collision, injuries and damages or any part thereof.

VII.

That the trial court erred in making and finding No. IV of its findings of fact, for the reason and on the ground that there was no substantial evidence produced in said cause supporting or tending to support said finding or any part thereof.

VIII.

That the trial court erred in refusing to find or adopt the finding or declaration of law proposed and requested by counsel for plaintiff in error as follows:

"That there was no evidence produced in this cause showing or tending to show that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint."

IX.

That the trial court erred in refusing to find or adopt the findings or declarations of law proposed and requested by counsel for plaintiff in error in words as follows:

"That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant."

X.

That the trial court erred in overruling and denying the motion for non-suit made by counsel for plaintiff in error at the close of all the evidence in said cause and before the argument and

final submission of said cause; said motion being made upon the following grounds:

"1. That the evidence failed to show or establish any cause of action in favor of the plaintiff and against defendant; and,

2. That the evidence showed plaintiff was injured by the negligence of his fellow-servants."

## ARGUMENT.

### I.

### The Orders were Sufficient.

There is nothing in the findings or opinion of the Circuit Court to indicate that it considered the orders insufficient; nothing to indicate that that court based its judgment in whole or in part on that ground.

That court in announcing its decision said:

> "Train Number 3, which should have passed Yucca at 4:57 did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and in failing to so act was negligent. * * * *Said negligence* of the train dispatcher, together with that of the conductor and engineer of train No. 3, in running said train ahead of its time, caused said collision." (Tr. pp. 18, 19, fols. 34, 35.)

Subsequently special findings of fact and con-

clusions of law were made and filed, wherein the negligence of plaintiff in error's train dispatcher is specified as follows:

> "That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders *as to the movement of one of said engines and train.*" (Tr. p. 14, fol. 25.)

Yet by the writer of the opinion handed down by the Circuit Court of Appeals insufficiency of the original orders was suggested as a possible ground for affirmance. "Under the circumstances," Judge Gilbert says, "it would seem that ordinary prudence required of the train dispatcher that he fix a point of meeting of the trains" (Tr. p. 114, fol. 226).

Not a particle of evidence supports that position. Plaintiff himself, an engineer of long experience, said that the orders were good and sufficient (Tr. p. 25, fol. 46, p. 26, fol. 49). So also testified Mr. Williams, the engineer of No. 3, whose disregard of the orders caused the wreck (Tr. p. 40, fol. 76). The dispatcher himself says that the system of dispatching under and in accordance with which the orders were issued is in use on all the best roads; (Tr. p. 31, fols. 60, 61). Mr. Butler, Chief Dispatcher, said that there was no need of an order fixing a meeting

point (Tr. p. 47, fol. 90). Mr. Denair, Division Superintendent, testified that the orders were proper and safe, (Tr. p. 48, fol. 93, 96 to 100); that such orders are in use on 90 per cent. of the mileage in the United States, (Tr. p. 49, fol. 94) —on all roads that use "the Standard Code," (Tr. p. 52, fol. 102). No other witness testified on the point. Upon these facts the suggestion made by Judge Gilbert cannot be called an inference from evidence; it is a mere obiter remark with no basis whatever in the case, but expressing the writer's personal idea of the proper mode of handling trains; an idea opposed to the experience of more than fifty years as shown by the standard rules which are the fruit of that experience—much of it expensive. Of the sufficiency of these rules there is besides a strong presumption of law.

> Thompson on Negligence, Vol. IV, section 4152.

II.

**Plaintiff in Error was not Negligent in not Giving a Further Order.**

The Circuit Court found and the Court of Appeals assumed that train No. 3 (westbound) passed Yucca, a station about two-thirds of the way from Kingman to Franconia, at 4:55, or two minutes ahead of its time under the orders, and therefore in violation of them, and that the railway

company knew this; and both courts held the Company negligent in not sending further orders to hold that train at Franconia. It may be noted here that No. 4 could not be notified because it had passed the last telegraph station west of Franconia before No. 3 reached Yucca.

Now appellant insists, first, that there is no evidence that train No. 3 passed Yucca ahead of its time; second, nor, if it did, that appellant was aware of the fact; third, conceding that No. 3 did pass Yucca two minutes too soon, that fact and knowledge thereof imposed no duty on the Railway Company to issue further orders; fourth, conceding such duty, the dispatcher was not bound to anticipate that train No. 3 would make a further gain of four minutes after passing Yucca, and to issue an order to stop in time to intercept that train at 5:11, the time that it passed Franconia;

*First. Where is the evidence tending to show that No. 3 did pass Yucca two minutes or any less time in advance of its schedule?*

The operator at that station says: "I reported that the train passed at 4:55" (Tr. p. 35, fol. 69), and adds that a few minutes later he was told by the train dispatcher to whom he made the report that his clock was two-minutes slow (Tr. p. 35, fol. 69). This correction of time was made almost immediately and at least eleven minutes

before No. 3 reached the next station. For the operator at Kingman heard the telegraphic conversation about the difference in time and it is plain from his testimony that it occurred before the accident. He says he heard this conversation about 5 o'clock and fixes the time because the accident occurred after 5 (Tr. p. 54, fols. 105, 106.) The dispatcher's testimony refers to the time he changed the entry on his time sheet and not to the time when he ascertained the difference in the clocks (Tr. pp. 30, 31, fols. 59, 60). Correct time is given daily at 8 a. m. to all stations (Tr. p. 42, fol. 79), and the operator at each station is expected "to take the correct time from the wire each morning at 8 o'clock" (Tr. p. 45, fol. 87). So that it was about 21 hours since the clock at Yucca had been corrected. It was not a standard clock (p. 45, fol. 87), so that there is nothing remarkable in its being 2 minutes too fast or too slow.

Another item of evidence shows that this conversation occurred before the accident. Train 34, (a freight), pulled out of the east end of Yucca siding at the same time that No. 3 was passing. It was the duty of the operator to report promptly the leaving time of this train. He reported it and it stands on the train sheet without correction "4:57". (Tr. p. 55, fol. 107; Exhibit facing p. 98.)

The operator at Yucca does not say at what time the train did in fact pass his station. He says, "I reported that it passed at 4:55" (Tr. p. 35, fol. 69); and then says he was told that his clock was two minutes slow. He was not asked when it did in fact pass.

The dispatcher says that about 4:58 he was notified that No. 3 passed Yucca at 4:55 (Tr. p. 27, fol. 52). This is no evidence of the fact that the train did pass at that minute. Perhaps if the operator at Yucca had not been accessible as a witness a report made by him in regular course might have been evidence of the fact stated, but not so when he is available and is actually called and testifies.

The train sheet was not evidence that the train passed at 4:55. Whether regarded as a mere memorandum or an entry made in regular course of business it was not competent evidence of the time of the passage of the train. For if it was a memorandum it was made by the dispatcher on hearsay information, given by the operator at Yucca, and therefore, could not be introduced in evidence *to show the time of the passage of the train*, except (if at all), in connection with the testimony of the operator, who was accessible and actually testified, but, as just stated, was not asked the vital question.

Numerous corrections appeared on the train

sheet; the mode of making the entries, the reasons for changes, the mode of making them were all explained by the chief dispatcher, (Tr. pp. 42-44, fols. 81-84). Even if such memoranda are styled entries in due course of business they were not admissible because the man who made them was living, accessible and a witness.

Chicago Lumbering Co. v. Hewitt, 64 Fed. 314.

If the train sheet was competent or relevant at all it was to show what report concerning the train had been received. On its face it showed 4:55, with the last figure changed to 7 (Tr. Exhibit facing p. 98).

Now the Judge of the Circuit Court said he believed that the dispatcher in telling the agent at Yucca, that his clock was slow was merely making a clumsy attempt after the accident to shield himself (Tr. p. 19, fol. 35). Suppose that surmise (and it is nothing more) to be correct; *still we are without a scintilla of evidence to show when train No. 3 passed Yucca.*

The witness Ross says that he does not know when No. 3 passed Yucca; that on his next trip (after the accident) the operator told him that No. 3 had passed at 4:57 and also told him that his train (No. 34) had left Yucca at 4:57 (Tr. p. 55, fol. 108). The train sheet also shows that Yucca reported No. 34 leaving at 4:57 (Exhibit

facing p. 98). Now, if this is any evidence at all it shows that No. 3 left Yucca at 4:57; for it is not disputed that 34 pulled out of the east end of Yucca siding as 3 passed by (Tr. p. 55, fols. 107-8.)

Hall indeed says that Ross told him that his (Ross's) understanding was that No. 34 left Yucca at 4:55 (Tr. p. 56, fol. 110). That may perhaps weaken Ross's statement that he *did not know* the time No. 3 passed Yucca, but it is no evidence of the time when No. 3 did pass Yucca.

Williams, engineer on No. 3, says he passed Yucca at 4:57 or 8; and that he looked at his watch at the time (Tr. p. 41, fol. 77). A little computation will show that it is hardly possible No. 3 passed Yucca at 4:55. It had stopped at Kingman and received orders (Tr. pp. 37, 53-4, fols. 72, 104) and left there at 4:31 (Tr. p. 54, fol. 106). It had to get under way and run 23.9 miles to reach Yucca (Tr. map facing p. 58). If it passed there at 4:55 it had started from a standstill and made the whole distance at 59.75 miles an hour. If it passed Yucca at 4:55 and Franconia at 5:11 the rate between those points was only 48 miles an hour (see map)—yet it passed Franconia at between fifty and sixty miles an hour, passing there at 5:11 and striking No. 4 a mile and a quarter west at a few seconds after 5:12 (Tr. p. 26, fol. 49; p. 32, fol. 61). But if we

assume that the time at Yucca was 4:57, then the rates are practically the same, being at 55.15 miles an hour from Kingman to Yucca and 55.85 from Yucca to Franconia.

*Second. If train No. 3 did pass Yucca at* 4:55, *defendant was not aware of the fact.*

Much of what has already been stated applies also to this proposition. Train No. 3 having passed Yucca the operator there reported it as passing at 4:55. At once and before the train reached the next station the operator was asked to state the time by his clock and then was informed that his clock was two minutes slow, which meant that his report should have read 4:57.

The dispatcher then understood that No. 3 was at Yucca exactly on the schedule fixed by the orders. He therefore had no reason to doubt the safety of No. 4 until No. 3 was reported passing Franconia at 5:11, six minutes too soon.

*Third: Even if No. 3 was two minutes ahead of time at Yucca and the dispatcher knew it (assuming those facts for the sake of argument), plaintiff in error was under no legal obligation to issue a further order.*

The question presented here is whether after a train dispatcher who has issued proper and sufficient orders for the operation of a train or trains, the observance of which by the train crews would

have insured the safety of all concerned, hears that such orders have been disregarded, he is required, in the performance of some duty owing from his principal to other employes and personal and absolute in character as distinguished from such duties of a principal as may be properly delegated to co-employes, to re-issue the orders or promulgate new ones to shield his principal from liability to such of its employes as might be injured in consequence of the disobedience of such original orders by their fellow-servants.

The findings of fact specify the negligence on the part of Train Dispatcher Moore as follows:

> "That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders as to the movement of one of said engines and train." (Tr. p. 14, fol. 25.)

The findings of fact clearly confine the negligence attributed to plaintiff in error to a failure on the part of Train Dispatcher Moore, after notice that No. 2 had passed Yucca two minutes ahead of time, to attempt to prevent the continued violation of the order. That this was the theory upon which the learned trial judge held against plaintiff in error is shown beyond

question by his written opinion filed at the time of announcing his decision. Therein his conclusion is stated as follows:

> "Train No. 3, which should have passed Yucca at 4:57 did so at 4:55 and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and in failing to so act was negligent." (Tr. pp. 16, 18, fols. 30, 34.)

And further:

> "Said negligence of the train dispatcher, together with that of the conductor and engineer on Train No. 3 in running said train ahead of its time caused said collision, and therefore defendant is responsible for plaintiff's injuries." (Tr. p. 19, fol. 35.)

The order of the court was that the finding should be prepared in accordance with its written conclusions (Tr. p. 19, fol. 36.)

Good and sufficient orders had been delivered not only to the engineer of No. 3 (Tr. p. 37, fols. 72, 73) but also to the conductor (Tr. p. 54, fol. 104.) They were in joint charge of the train (Tr. p. 66, rule 48) and the engineer was bound to obey any reasonable order given by the conductor (Tr. p. 66, rule 49). If the train passed Yucca at 4:55 it was the conductor's duty to order its speed reduced till it should be again within its schedule (Tr. p. 60, rule 7.)

The respondent therefore asks the court to hold that the train dispatcher was bound to assume

not merely that the engineer would continue in disobedience but also that the conductor would negligently permit his train to run on in defiance of the orders in his possession; or that if the dispatcher was bound to suspect the engineer's watch had gone wrong, then that he should also have anticipated that the conductor's timepiece was likewise at fault.

Moreover what does the evidence show as to the situation and circumstances within the knowledge of Train Dispatcher Moore at 4:59 on the morning of this collision, at which time he is said to have been informed by Yucca that Train No. 3 passed at 4:55? So far as appears there was no train on, or about to enter upon, that portion of the line lying between Yucca and Needles except the trains in question. There were at least two trains moving on that portion of the line lying between Yucca and Kingman (Tr. pp. 54-5, fols. 106-7). No. 4 had departed from Needles at 4:22 or 4:23 (Tr. p. 24, fol. 42, Train Sheet facing p. 98); her time table running time from Needles to Franconia was 44 minutes (Tr. Time Table facing p. 94); this was at a rate of speed of less than 32 miles per hour (Tr. p. 26, fol. 50); the distance between Needles and Franconia was only 24.5 miles (Tr. Map facing p. 58). Thus it appears that had No. 4 on this run made her schedule time from Needles to Franconia, and to

have done so would have required only an average speed of 32 miles per hour, she would have arrived at Franconia at 5:06, or 11 minutes before No. 3 was, according to her orders and time schedules, due at that point (Time Table facing p. 94), and 9 minutes before No. 3, running two minutes ahead of time, would arrive. It appears that less than two minutes from the instant of the collision would have sufficed to place No. 4 on the side-track and clear the main track (Tr. p. 24, fol. 45).

No. 4 arrived at Mellen between 4:42 and 4:45, there being some variation in the evidence as to the exact time (Tr. p. 23, fol. 44), having made the run in from one to four minutes less than her schedule time; she departed from Mellen at 4:46, bound for Franconia, to there wait and pass No. 3 (Tr. p. 23, fol. 44); her schedule running time between Mellen and Franconia was 19 minutes, and the distance between these points only 12.6 miles (Time Table facing p. 94). Here again it appears that had No. 4 on this run made her schedule time she would have arrived at Franconia at 5:06, as before shown.

There is not a fact or circumstance shown in evidence in any manner indicating that Train Dispatcher Moore had any reason to believe that No. 4 would not make her schedule time to Franconia and be on the side-track and in safety sev-

eral minutes before No. 3 was due at that station. No. 4 in the run between Mellen and Powell consumed four minutes more than her schedule time for that run, arriving at 5 o'clock instead of 4:56 (Tr. p. 24, fol. 45—Time Table facing p. 94). Powell was neither a telegraph station nor a regular stopping place for either of these trains (Tr. pp. 25, 32, fols. 47, 63), but No. 4 was stopped there for three or four minutes in order that the flow of fuel oil on one of her locomotives might be remedied. This time was lost from her schedule time. Train Dispatcher Moore did not and could not know of these delays.

The dispatcher certainly had no reason to suppose No. 4 would be delayed so much as to be endangered by the supposed encroachment of two minutes by No. 3. In fact the court found that such encroachment did not endanger train No. 4, for he finds that No. 4 would have reached Franconia and been on the siding more than two minutes before No. 3 was due there under the orders (Tr. p. 19, fol. 36).

We submit that the too early arrival (if it be so) of No. 3 at Yucca did not make it the duty of Train Dispatcher Moore, as a representative of his principal, to send any additional orders to No. 3. He had previously promulgated orders which had been regularly delivered to and received by the conductor and engineer of that train

sufficient in all respects to insure the safe operation of the two trains in question had such orders been obeyed, and having once given proper and sufficient orders in the premises, the duty of the master had been fulfilled; and the subsequent violation of the orders in question by the conductor and engineer of No. 3 was an act, not of plaintiff in error, but of fellow-servants of the defendant in error and for which plaintiff in error is not liable. These *conditions* and *facts* are expressly recognized and declared in the first sentence of the 4th paragraph of the conclusions of the trial court as follows:

> "Train No. 4 had sufficient time after leaving Powell to clear No. 3 at Franconia if the latter train had been run in accordance with Order No. 23, and therefore, plaintiff was not guilty of contributory negligence." (Tr. p. 19, fol. 35.)

The above quoted excerpt from the written conclusions of the court, and which is fully sustained by unconflicting evidence, shows conclusively that plaintiff in error through and by its train dispatcher had discharged every duty incumbent upon it in the premises, for "Order No. 23" therein referred to is the order that the train dispatcher had issued to the conductor and engineer of Train No. 3 for their guidance in the operation of said train. The violation of that order by the conductor and the engineer of Train No. 3

was, as is shown by all the evidence in the case, the sole cause of the lamentable catastrophe that resulted in the injuries to defendant in error.

By the promulgation of the orders providing a plan for the operation on this run of the trains in question, Train Dispatcher Moore had fully performed and discharged the duty of plaintiff in error in the premises, and he was not obliged to repeat those orders or promulgate a new one, even if advised that Train No. 3 had to some extent violated its original order by passing Yucca Station two minutes ahead of time. There is no ground either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them; and yet it comes to that if the theory of the trial court can be sustained, that it was the duty of the train dispatcher to send out an additional order for No. 3 to obey the proper and sufficient orders that had already been given.

If the principle announced by the trial Judge in the first sentence of the second paragraph of his Conclusions, that

> "Train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia and in failing to so act was negligent" (Tran. p. 18, fol. 34),

—implying as it does that an absolute duty rest-

ed upon plaintiff in error as principal to exercise reasonable care to discover and prevent continuance of transitory dangers which might threaten the safety of certain of its employes, although such dangers are created by negligent violations on the part of their fellow-servants of proper and sufficient orders issued by plaintiff in error for the government of the common work—is correct, then it is difficult to understand how an employer can ever relieve himself of liability if his orders are disobeyed and his intentions thwarted by careless employes.

We concede that it is the duty of a railroad company to promulgate adequate rules and regulations for the safety of its employes engaged in the dangerous duty of operating trains, and at times telegraphic orders for the movement of trains, but the duty of the railroad company goes no farther.

The duty of complying with the rules, regulations and orders that have been given to them and of carefully operating the trains is a duty incumbent upon those employes to whom their operation has been intrusted. All employes so engaged are fellow-servants and no recovery can be had against the railway company for an injury sustained by one of such employes due to the negligence of another, notwithstanding such negligence may have consisted *solely* in the disobed-

ience of an order issued by the company for the operation of its trains.

This principle of law is sustained by every adjudicated case with which we are familiar, and is very clearly and forcibly stated in Bailey's "Personal Injuries Relating to Master and Servant," Vol. II, Sec. 3290, as follows:

> "It is the duty of railroad corporations to prescribe, either by means of time-tables or other suitable modes, regulations for running their trains with a view to better safety, but it is obvious that obedience to these regulations must be intrusted to the employes having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation can personally oversee and as to which employes must be relied upon."

Obedience to the regulations of a railroad company in regard to the running of trains is a matter of executive detail which neither the corporation nor any general agent of it can personally oversee but as to which employes must be relied upon. If these employes fail in their duty by breaking existing regulations and in consequence other employes are injured, no action can be maintained for the injury, as it will be deemed to have been caused by the negligence of a fellow-servant.

Rose vs. Boston & A. R. Co., 58 N. Y. 217;

Slater vs. Jewett, 85 N. Y. 62; 39 Am. Rep. 627;

Kennelty vs. Baltimore etc. R. Co., 166 Pa. St. 60; 30 Atl. 1014;

Healy vs. New York N. H. & H. R. Co., 20 R. I. 130; 37 Atl. 670.

In Healy vs. New York N. H. & H. R. Co., *supra*, the rule is very clearly and forcibly stated, in the third point of the syllabus, as follows:

> "Where a railroad company transmits to an engineer orders which, if obeyed, will avoid a collision with another train, it has in that respect performed its duty of furnishing a clear track for such train, and is not liable to a fellow-servant of such engineer for injuries by a collision produced by the engineer's disobedience of the orders.

Not only did the crew in charge of No. 3 violate the special orders given them but they also were guilty of a flagrant violation of General Rule 392, which provides as follows:

> "A train must not leave a station in advance of its schedule time." (Tran. p. 82, fol. 162.)

*How many times* was the railroad company under obligations to issue good and sufficient orders for the movement of the trains in question, and by what rule of law could the violation of such orders by its employes give a right of action against the railroad company to their fellow-servants who were injured by rea-

son of such negligence on the part of such careless or wilful employes?

And it seems to us that the following excerpt from the opinion of the court in Maher vs. Union Pacific D. & G. Ry Co., 206 Fed. 311, is exceedingly applicable to the facts of this case and decisive of the non-liability of the plaintiff in error:

> "The train dispatcher did not give any orders to the conductor of No. 12, regulating the movement of his train at Clayton station. How he should move his train there, and whether he should head out or back out of the siding, and what precautions he should take to prevent a collision while moving his train onto the main track, were matters of detail, concerning which it was the duty of the conductor to conform to the usage and practice in such cases and the rules of the company. Such matters of detail are not regulated, and cannot be regulated, by orders from the train dispatcher. All orders emanating from the train dispatcher are to be received and read in the light of these well-known rules for the movement of trains at stations on and off the sidings, and for the violation of such rules the train dispatcher is not to be convicted of negligence."

A master is not bound to supervise the merely executive details of the work to be done by his servants.

In Howard vs. Denver & R. G. R. Co., 20 Fed. 837, it was said:

> "The negligent use by one employe of perfectly safe machinery will seldom be adjudg

> ed a breach of the master's duty of providing a safe place for other employes. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place."

The same doctrine is announced in Baird vs. Reilly, 35 C. C. A. 78; 92 Fed. 884, where the plaintiff based his claim upon an alleged violation of the duty of the master to supply a reasonably safe place for work, and after conceding the correctness of that proposition, in cases where applicable, the court said:

> "When, however, it appears that the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying out the details of the work, or by the neglect of a fellow-servant, a different rule is applicable."

In Michigan C. R. Co., vs. Dolan, 32 Mich. 510, the same limitation upon a master's positive obligations to his servant, is recognized and expressed as follows:

> "We are not disposed to discuss the question, on which some courts have differed, how far down in the chain of delegated appointments the master is to be held as bound to personal supervision. The starting point—that he is only liable for his own neglect—is one from which we have no right

to depart. And it is plain enough that, when he is held to any personal supervision which, from the nature of his business, is impracticable, the rule is violated, and there is no tangible distinction left between liability to servants and liability to strangers. We think some of the decisions have led very far towards destroying all means of discernment."

Judge Morrow in Herman vs. Port Blakely Mill Co., 71 Fed. 853, recognized and applied this limitation, saying:

"The contention of counsel for libelant is that the place where libelant was working was rendered unsafe by reason of the fact that the person on the wharf whose duty it was to give the warning failed to do so and that this negligence constituted a breach of duty on the part of the master to furnish a safe place for libelant to work in. The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do."

The rule above enunciated cannot be questioned, for it is supported by an unbroken line of decisions not only of the Supreme and Circuit Courts of the United States, but also by the courts of last resort of every state of the union. And the fact set forth in the opinion of the trial court, that—

> "Train No. 4 had sufficient time after leaving Powell to clear Train No. 3 at Franconia *if the latter train had been run in accordance with Order No. 23*". (Tr. p. 19, fol. 35).

brings this case squarely and unequivocally within the rule above stated; and it follows that there were neither facts nor *legitimate inference of fact* anywhere in the case to support findings of fact three and four above referred to.

The plaintiff in error, having discharged its full duty toward its employes engaged in operating the trains in question, could not be deprived of the immunity thereby secured by the action of the conductor and engineer of No. 3; for if such a theory could be sustained it would nullify the general doctrine of the non-liability of the master for injuries caused by the conduct of fellow servants. Special Order No. 23 did not in terms prescribe the general running time of No. 3, that is to say, it did not designate the time of the arrival and departure of that train from the several stations intervening between Kingman and Needles, but

only required it to run two hours late, and left its movements otherwise to be governed by the schedule time upon that portion of the road in question; nor did it in anywise alter the effect or general rules for the operation of trains. And, as already stated, "Rule 392" provided, among other things, that:

> "A train must not leave a station in advance of its schedule leaving time."

And it appears from all the evidence in the case that but for such special order the time of No. 3 would have been 2:57 at Yucca Station and 3:17 at Franconia, and under the special order 4:57 at Yucca and 5:17 at Franconia, and under the above quoted provision of Rule 392 No. 3 should not have left either of these stations a moment in advance of 4:57 at the one and 5:17 at the other; and of the existence of that rule and of the necessities therefor and the duties and obligations it devolved upon them the engineer and conductor of No. 3 had full and complete notice, and yet they violated it two minutes at Yucca Station and six minutes at Franconia. Under these facts it would have been an idle thing for the train dispatcher to send any additional orders to No. 3 after having learned of its violation of running time at Yucca, and something not required either by principle or authority.

That such violation of orders created a dan-

gerous condition goes without saying, but by whom? Certainly not by the plaintiff in error nor by its train dispatcher, but solely and exclusively by the fellow servants of the defendant in error. In this connection we quote from the opinion of the Supreme Court of Mississippi delivered by Chief Justice Campbell, in a case practically "on all fours" both as to facts and law with the case at bar, an extract which most forcibly and peculiarly expresses the situation here:

> "It is not admissible now to try the sufficiency of the order given by the train dispatcher by the lamentable result of its disobedience by those in charge of train No. 6. *Post hoc ergo propter hoc* is no legitimate argument. There is not room for difference of opinion as to the sufficiency of the order given to No. 6 to have prevented the collision, if it had been regarded. That form of order was in frequent use on the road and was well understood, and but for its having been disobeyed would have insured the safety of Doyle.
>
> Chicago, St. L. & N. O. R. R. Co., vs. Doyle, 60 Miss., 977; 8th Am. & Eng. R. R. Cases 174.

In Lewis vs Seifert, 116 Pa. St. 628; 11 Atl. 514, the leading case with regard to a train dispatcher as a vice-principal, in dealing with the question of the liability of a railway company for the acts of its train dispatcher, it is said:

> "If it be the duty to provide schedules for

> moving of its trains which shall be reasonably safe it follows logically that, when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employes engaged in the running of such trains. I am not speaking now of collisions *caused by disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders.*"

And again:

> "The distinction between a general dispatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. *The latter have the duty of obedience.* Their business is to run their trains under orders from the dispatcher, and if an employe is injured *as the result of their negligence, the company is not liable.* They are in the same common employment, and are laboring together to the same end, and under orders from superior authority."

The dangerous situation caused by the engineer and conductor of No. 3, by their violation of special order 23 and rule 302, was without fault on the part of the plaintiff in error and consequently it was under no *legal* obligation either to them or to any of their fellow servants to take measures to rescue them from the impending danger, although, of course, a different rule would obtain between the plaintiff in error and third parties, passengers on its train for instance. This

principle is clearly enunciated by the Supreme Court of Georgia in *Allen v. Hickson*, 119 Ga., 400; 30 S. E., 810, in which Judge Lumpkin, in delivering the opinion of the court, declared it as follows:

> "When an employe without fault on the master's part, becomes placed in a dangerous or painful situation, *the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employe's speedy release.* Being in no way responsible for the unfortunate occurrences, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability."

The rule is well established that the duty to provide a safe place for the work does not carry with it the obligation to protect that place from dangers arising from acts of fellow servants, even in cases where the fellow servant fills a dual capacity, that is, being a vice-president insofar as providing a safe place is concerned.

Donnelly v. S. F. Bridge Co., 117 Cal., 417;

Donovan v. Ferris, 128 Cal., 48;

Martin v. Atchison, T. & S. F. R. Co., 166 U. S., 399; 41 L. Ed., 1051;

O'Neil v. Great Northern R. Co., 80 Minn., 27; 82 N. W., 1086.

The master is under no obligations to preclude or warn against such dangers as arise from the conduct of the business in which his employes are engaged and which are transitory risks incident to the work and produced by the action of the employes themselves.

Northern Pacific R. Co. v. Dixon, 194 U. S. 338.

In Whittaker v. Bent, 167 Mass., 588; 46 N. E. 121, this doctrine was expressed as follows:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."

See also as supporting the same doctrine:

Meehan v. Spiers Mfg. Co., 172 Mass. 375; 52 N. E., 518;

Durst v. Carnegie Steel Co., 173 Pa., 162; 33 Atl., 1102.

"Where a railroad company transmits to an engineer orders which if obeyed will avoid a collision with another train, it has in that respect performed its duty of furnishing a clear track for such train and is not liable to a fellow-servant of such engineer for injuries by a collision produced by the engineer's disobedience of the orders.

"No amount of diligence on the part of a railroad company can prevent an accident like the one upon which the second count is based. The company has the right to presume that its orders will be strictly fol-

lowed; and all it can do when such orders are disobeyed is to summarily discharge the servant who thus offends, as was done in the case at bar. So far as appears the defendant had no more reason to believe that Pickering would disobey the orders of his superior than the plaintiff had."

Healy v. R. R. Co., 20 R. I. 136, 37 Atl. 676.

*Fourth: Conceding, for the sake of argument, that the dispatcher was bound to issue an order to stop, he was under no obligation to issue it in time to intercept No. 3 at Franconia at* 5:11.

The Circuit Court found that the train dispatcher was negligent in failing to stop No. 3 at Franconia. While the finding is so stated, it necessarily implies a more specific finding of facts as follows: The train dispatcher was negligent in failing to give the operator at Franconia a stop order for No. 3 in time to intercept that train at 5:11.

Now, is it true under the evidence that the train dispatcher was negligent in not having an order to stop at Franconia before 5:11, at which time No. 3 passed that station? The rules (see tr. p. 93, fol. 183) provide a specific form for a stop order. It is very brief, it can be transmitted certainly in fifteen seconds, probably in less time than that. There was an operator on duty at

Franconia subject to call at any instant. It is not expected that orders shall be given long in advance or much in advance. It is provided that they shall not be given an unnecessarily long time in advance (tr. p. 88, rule 471). Now, assuming that the train dispatcher understood that No. 3 had passed Yucca station at 4:55, he knew that the running time between Yucca and Franconia was 20 minutes. He knew, therefore, that if No. 3 did not exceed its running time between those stations, it would not get there before 5:15; so an order to intercept No. 3 at Franconia would be in time if given as late as 5:14. Then if he was bound to stop No. 3 at Franconia, he could not be negligent until it was too late to give an order that would be effective at 5:15. Now, it may be that up to 5:11 he had not intended to give an order to stop No. 3. But there can be no negligence in law until the *time for action* has passed without action. The time for action did not elapse until 5:14. The train dispatcher, therefore, cannot be said to have been negligent at 5:11 for failing to give an order which he was not bound to give before 5:14. To say otherwise is to say again that the train dispatcher was bound to expect that the engineer of No. 3 would gain additional time, the only ground for such expectation being that he had gained two minutes on his time in passing Yucca. We have found no

authority for the position that an employer is bound to expect negligence in an employe from the fact that that employe has been guilty of a single act of negligence theretofore, nor any authority holding that an employer is bound to expect a greater degree of negligence from a less degree.

It was of importance that No. 3, already late, be brought west as rapidly as practicable. For that reason it had been given the right of track. The train dispatcher had a right to wait until 5:13 or 5:14 for the report of the arrival of No. 4 at Franconia from the west. Such arrival reported, it would have been unnecessary to stop No. 3. If at 5:13 No. 4 had not arrived it would have been time to order No. 3 held for orders, that is, ordered not to leave Franconia before 5:17.

III.

**If the train dispatcher was negligent, his negligence was not that of the company but of a co-servant.**

It is to be noted here that it is nowhere suggested that any notice of any fact pertinent to this case was brought to any person, except the train dispatcher, who can by any possibility be deemed a vice-principal.

Negligence of plaintiff in error "through its train dispatcher" was the finding of the court

(tr. p. 14, fol. 25). If this be regarded merely as a finding that plaintiff in error was negligent, then we contend that it is wholly unsupported by evidence, since the evidence shows negligence (if any) only on the part of the engineer and conductor of train No. 3 and on the part of the train dispatcher, all of whom were made under the circumstances shown here fellow servants of defendant in error.

If this be regarded as a finding that the train dispatcher was negligent and that, therefore, the plaintiff in error is liable, we contend that the finding does not support the judgment in that it fails to show that the negligence of the train dispatcher was that of a vice-principal and not of a fellow-servant. Special findings must, like special verdicts, state all facts necessary to support the judgment and leave nothing for inference.

Even should it be held that there is a duty resting upon a train dispatcher to discover and warn against the continuance of isolated and temporary violations of orders by train crews in the operation of their trains under original orders proper and sufficient for that purpose, still we confidently contend that such duty is not a positive duty of the railroad company or master but one of the performance of which may be properly delegated to an employe. The test of vice-principalship is the nature of the duty which it is claimed has been

violated or the character of the act the performance or non-performance of which caused the injury complained of. The mere fact that the performance of a duty not personal to a railroad company as master is delegated to a train dispatcher does not change the essential nature of the duty and make it one for the violation of which by the train dispatcher the railroad company may be held liable. The logic of the decision of the trial judge in this case seems to be that if a train dispatcher sustains the relation of vice-principal to his employer and co-employes in respect to any act or duty, it follows that he sustains the same relation in respect to every duty he has to perform within the scope of his employment. In other words, that once a vice-principal always a vice-principal. This reasoning, we claim, is clearly unsound. There is express and respectable authority to the point that a train dispatcher is not in all things and at all times the *alter ego* of his employer. In a case recently decided by the Supreme Court of Pennsylvania it was sought to charge a railroad company with knowledge of the incompetency of one of its local telegraph operators by showing that its train dispatcher had knowledge of such incompetency gained while acting as such train dispatcher, on the theory that the train dispatcher was the representative

of the railroad company for all purposes. Upon this point the court said in part:

> "It is contended by the appellant on the authority of Lewis v. Seifert, 116 Pa. St., 628; 11 Atl. Rep., 514, that Perdue (train dispatcher) was vice-principal and that his knowledge of the incompetency of the station agents and telegraph operators in the service of the company must be considered as its knowledge. This might be so if he was clothed with the power of employing and discharging such servants. But he was not charged by the company with its duty in reference to the selection and retention of its employes. *To the extent that he was the representative of the Company in the performance of a positive duty it owed to its servants it is responsible to them for his negligence, but beyond that it is not.* The contention of the appellant that the knowledge of Perdue respecting the qualifications of Crossman was the knowledge of the Company finds no support in Lewis v. Seifert, *supra. In that case the company was held liable for an injury to an employe caused by the negligence of its representative in the performance of a duty it owed to its servants.*" (Italics ours.)
>
> Reiser v. Pennsylvania Company, 152 Pa. St., 38; 25, Atl. 175.

It is a well established rule that an employe may occupy a dual position, that of co-servant as to all matters within the scope of the employment and the discharge of such duties as are not personal to or absolute upon the master, and as

representative of the master in all matters where he is charged with the absolute and personal duties of the master.

In Baltimore & O. R. Co. v. Baugh, 149 U. S., 368, 387; 37 L. Ed., 772, in the course of a full discussion of the question of vice-principalship, the rule mentioned is well expressed as follows:

> "The question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

In Olson v. Oregon Coal & Navigation Co., 96 Fed., 109, it is held that even the master of a ship does not in respect to the performance of all of his duties represent the owner. It was said:

> "While it is true the master of a ship is a servant of higher grade than that of a seaman and represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, still in all matters pertaining to the navigation of the ship the master and seamen are fellow servants engaged in one common employment and each assume the risk of the other's negligence in

the discharge of the duties incident to such common employment."

See also as fully sustaining this doctrine:

Northern Pacific R. Co. v. Herbert, 116 U. S., 642; 29 L. Ed., 755;

Union Pacific R. Co. v. Snyder, 152 U. S., 684; 38 L. Ed., 597;

Nixon v. Selby S. & L. Co., 102 Cal., 458;

Donnelly v. S. F. Bridge Co., 117 Cal. 417;

Crespin v. Babbitt, 81 N. Y., 521; 37 Am. Rep. 521.

In Northern Pacific Ry. Co. v. Mix, 121 Fed., 476, and in each of the other cases where it has been held that a train dispatcher acted as the agent or representative of his employer, the duty negligently performed or omitted by the train dispatcher related to the promulgation of orders necessary and required for the safe operation of the train there in question in the manner and according to the plan provided and directed by the master or his representative. In neither of these cases was there involved the question as to the duty of the master or his representative to issue additional orders solely for the purpose of preventing or correcting breaches negligently committed by employes of otherwise sufficient orders already promulgated. In no case, so far as we are aware, has a railroad company ever been held

responsible to any of its employes for a failure of its train dispatcher to send an order commanding obedience to a proper and sufficient order that he had already issued and which had been received but disregarded by the employes to whom it was given. And we challenge both Federal and State Reports to disclose a single case in which a railroad company or other employer has ever been liable to an employe upon facts and circumstances similar to those disclosed by the record in this case.

IV.

**Conceding for the purpose of argument, the dispatcher's negligence and that it was that of a vice-principal, It was not the proximate cause of the injury.**

> "It were infinite for the law to consider the causes of causes and their impulsions one of another. Therefore, it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree."—Bacon.

"Proximate cause," has never been so defined as to furnish a ready rule and measure of every state of facts; but we submit the following quotations and references in order to emphasize the particular phase of the subject presented by the facts disclosed in the case made by the defendant in error and found by the Circuit Court:

Mr. Justice Strong in Railway Company v. Kellogg, 94 U. S. 469; 24 L. Ed., 256, said:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked as to make a natural whole, or was there some new and independent cause operating between the wrong and the injury?"
>
> "The negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen or reasonably anticipated under the circumstances as its probable result. That negligence which sets in motion a train of events that in their natural sequence might and ought to be expected to produce an injury, if undisturbed by any independent, intervening cause, is the proximate cause of that injury."

Judge Sanborn in Railway Company v. Moseley, 57 Fed. 921, an opinion in which Mr. Justice Brewer concurred.

In Louisiana Mutual Insurance Company v. Tweed, 7 Wall. 44; 19 L. Ed. 65, Mr. Justice Miller said:

> "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Mahogany v. Ward, 16 R. I. 479, 17 Atl. 860,

was an action for injuries suffered by the plaintiff by reason of defect in a highway. The defect consisted in a post that stood too near the traveled part of the highway, and the facts were that the plaintiff driving along the carriage road met a wagon, the driver of which wholly failed to turn out from the middle of the road, forcing the plaintiff to the side and against the post. *The court said that in all the highway cases cited the cause concurring with the defect in the highway to produce the injury was a natural cause or pure accident for which no person was responsible and not as in the case at bar the independent act of a responsible person.* Such an act, it is said, arrests causation, being regarded as the proximate cause of the injury, the original negligence being considered merely as its remote cause. Referring to Wharton on Negligence, Sec. 134.

In Texas & Pacific Railway Company v. Doherty, 15 S. W. 44 (not officially reported,) the suit was brought against a steam railroad company and a street railroad company. Judgment was recovered against both and both appealed. It appeared that the steam road company had left a car standing on its track close to the track of the street road. For the purposes of the opinion is was assumed that the act of the steam road company in so leaving the car was negligence. It appeared that a street car driven

at a moderate rate of speed could pass the stationary car safely, but the employes of the street railroad negligently ran a car at high speed bringing on a collision with the stationary car and causing the injuries complained of. The court held that the negligence of the steam railroad in leaving its car too close to the other tracks was not the proximate cause, was not even a proximate cause of the injuries but that the intervening, independent negligence of the street road, like that of the engineer and conductor here was the proximate cause.

A freight train broke in two owing to defective coupling. After it broke it ran some five miles and the sections came together owing to the negligence of the engineer and of the rear brakeman. It was held that the plaintiff, who was an employe, could not recover because, although the train would not have parted except for the defective coupling, the subsequent negligence of the engineer or of the rear brakeman or both was the proximate cause of the accident.

Richmond v. Tribble's Administrator, 97 Va. 495, 24 S. E. 278.

In State v. Ruth, 9 S. Dak. 84, 68 N. W. 189, it appeared that the defendant was the Commissioner of School and Public Lands; that it was his statutory duty to make a distribution of school funds in the hands of the State Treasurer, that

he failed to make such distribution, and that after the time when it should have been made the Treasurer defaulted and the funds were lost. The court said that it was not alleged that the defendant's conduct was corrupt or that he was guilty of any wanton wrong; that it was not a natural or probable consequence of his negligence that the fund would be lost by defalcation; that an unusual, extraordinary event, *a new, independent and efficient cause intervened sufficient to stand in itself as the cause of the misfortune;* that it and not the defendant's negligence was the proximate cause. Yet it is plain that had the commissioner not been negligent the loss would not have occurred, because the distribution would have been made before the Treasurer's defalcation.

Judge Cooley, in his work on Torts, page 70 of the first edition, says:

> "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remote."

Wharton, in his work on Negligence, Section 134, says:

> "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must

be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent, responsible human action. I am negligent on a particular subject matter; another person moving independently comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so the person so intervening acts as a non-conductor and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I am liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."

And he refers to Baron to the effect that causal connection may be interrupted by the intervention of an independent agency although the act whose operation was thus anticipated was of itself calculated to produce the particular evil, giving this instance. A person who mortally wounded a slave could not be held liable for the latter's death when, before death ensued from such wounding, a third person came in and gave the slave another wound from which he immediately died.

In Sections 136, 137, 138, 139 and 140 Wharton states at length the reasons for this limitation in the law of negligence and for this application of the maxim concerning proximate cause,

reasons which seem to be convincing and conclusive and fully to cover this case.

See also Broom's Legal Maxims, 8th ed. p. 216, and the close distinctions made by Chief Justice Erle in

Ionides v. Ins. Co., 14 C. B., N. S. 259.

In Railway Company v. Periguey, 138 Ind. 414, 34 N. E., 233, an engine was sent out with a defective headlight or, rather, with no headlight; but it was provided with hand lamps that could be used in the place of a headlight. They were not used. The engineer had orders to stop at Argos and wait for No. 167. He stopped; but being informed by someone, without authority apparently, that 167 had already passed, he proceeded and after going a few miles saw No. 167 coming and stopped his engine. The engineer on 167, because the other engine had no headlight, did not see it in time to stop, and the question was whether the want of the headlight was the proximate cause, or the failure of the engineer to obey his orders or to use hand lamps. The court said it was indeed true that the company was negligent in sending out the engine with a defective headlight, and that if the headlight had been burning the accident would not have occurred, but that the negligence of the company in that regard would not have brought on the accident but for the independent negli-

gence of the engineer in disregarding his orders to stop and in also disregarding the rules requiring him to use the hand lamps, and that therefore the negligence of the company in sending out the defective engine was not the proximate cause of the injury. The court also said:

> "We have found that the act of the appellant was not a proximate cause of the injury; that the act of Perris (engineer) was the immediate cause of the injury, and it follows that the two acts were not concurrent in causing the injury. We doubt if a case can be found where an act of the master though negligent but not causing injury, or concurring as a cause of injury, is coupled with a wrongful act of a servant and made the basis of recovery fo rsuch injury."

*It has been sometimes loosely said that that act of negligence is a proximate cause without which the injury would not have occurred.* But a hundred illustrations show the inaccuracy of such a statement. Thus it was negligence for the carrier to use a lame horse, but for which the canal boat would not have been caught in the flood; yet that negligence is not the proximate cause of the ensuing loss of the cargo.

Morrision v. Davis, 20 Pa., St. 171;
Denny v. R. R. Co., 13 Gray, 481.

The negligent act (violating an ordinance) of allowing water to run down a gutter where it

froze, is not the proximate cause of injury to a horse that slipped on the ice and broke his leg.

Sharp v. Powell, L. R. 7, C. P. 253.

A street car was so negligently driven as to throw plaintiff into the street, where, in a moment, she was struck and hurt by a runaway horse; the negligence of the car company was not the cause of the injury, although without such negligence it is manifest the injury would not have been suffered.

Ry. Co. v. Trich, 117 Pa. St. 390; 11 Atl. 627.

A motorman negligently ran his car at rate exceeding that allowed by law, so bringing himself under a tree at the moment that it chanced to fall; it was held that his negligence was not contributory to the injury inflicted on him by the falling tree.

Berry v. Sugar Notch, 191 Pa. St. 345; 43 Atl. 240.

And see the following cases already referred to at some length in this brief:

Mahogany v. Ward, 16 R. I. 479; 17 Atl., 800;

Railway Co. v. Doherty,——Tex. Civ. App.,——15 S. W. 44;

Richmond vs. Tribble's Adm. 97 Va. 495; 24 S. E. 278;

Ry. Co. v. Periguey, 138 Ind. 414; 34, N. E. 233.

*This test of indispensableness is a negative and not a positive test:* it is valuable for eliminating causes not proximate; for evidently that cannot be a proximate cause without which the injury would nevertheless have occurred. But after eliminating all antecedents not indispensable we may still have a residuum of several negligent acts and in selecting from these the proximate cause, the test referred to will be of no assistance.

It may be impossible to state a formula that shall be aways adequate. But we submit that *a negligent act cannot be deemed a proximate cause of an injury from which it is separated by another's independent negligent act sufficient of itself to produce the disaster.*

Bosworth v. Brand, 1 Dana 377, contains valuable illustrations on proximate cause. A dog is lured by the bait in a trap unlawfully set. While smelling near he is accidentally shot. The setter of the trap is not liable, although but for the trap and its bait the dog would not have been shot; and although, further, the trap would itself have probably injured or killed the animal had he not been shot.

A dealer sells gunpowder to a small boy—a negligent act. The boy put the powder in a cupboard. A week after, his mother gave him some of this powder and he hurt himself with it. It was held, of course, that the negligent act of the mother

intervened as proximate cause relieving the dealer from liability; although, clearly, without his negligent act, the injury would not have occurred and although, clearly his act was such as might probably, very probably, have resulted in the very injury sustained.

Carter v. Towne, 103 Mass. 507. (Opinion by Justice Gray.)

A Railway Company is liable for fires set by it, no matter how far they are spread by the forces of nature; but it was held the company was not liable for death of person suffered while she was trying to extinguish such fire. Her act was voluntary; it was a new intervening cause, not to have been expected.

Seale v. Ry. Co., 65 Tex. 271.

Labatt, Master and Servant, Vol. 2, p. 2229, says that in a few decisions courts have recognized more or less explicitly the principle that a master is not protected by the fact that the injury was immediately due to the negligence of a fellow servant, if the commission of that negligence might reasonably have been anticipated. He says that the general principle which declares that the chain of causation is not broken by a negligent act which might reasonably have been anticipated can not be admitted into the law of an employer's liability without greatly restricting the right of the defendant to rely on the doctrine as to co-

servant; and that it is quite evident that the restriction thus indicated has never received any serious consideration in a multitude of cases in which it might, upon the evidence, have been treated as an element in the inquiry; and that *the severance of the chain of causation is almost invariably assumed to be a rigid inference of law which takes effect as soon as it is shown that the injury proximately resulted from the negligence of a co-servant.*

Now, the negligence of the engineer and conductor of No. 3, in ignoring the orders given caused the hurt. But that negligence up to the time of passing Yucca (if they were negligent, which we dispute) did not cause nor contribute to the injury. At Yucca No. 3 was, at the most, two minutes ahead of time. Had it continued only two minutes ahead of the time the accident would not have occurred, for in that case it would not have reached Franconia till 5:15 before which time plaintiff would have been safely on the siding and out of harm's way. For it will be noted that the collision occurred at between 5:12 and and 5:13 at a mile and a quarter west of the middle of a half mile long siding, or only a mile west of the west end of the siding (Tr. p. 32, fol. 61.) Plaintiff says he had plenty of time—would have been on the siding in a minute and a half; would have had three and a half minutes to spare (Tr.

p. 24, fol. 45, p. 26, fol. 49). This too was the conclusion reached by the trial court:

> "Plaintiff but for said collision could have reached and placed his train number 4 on said siding within two or three minutes thereafter, and this would have been *two or three minutes before number 3 was due at said station.*"

It was the gain of four minutes made by number 3 between Yucca and Franconia that caused the wreck. The supposed gain of two minutes on the way to Yucca had nothing to do with the accident. *It would have happened just the same had Williams passed Yucca at* 4:57 *instead of* 4:55, and it would not have happened had he kept to his running time and only two minutes ahead of his schedule after passing Yucca.

Now, with respect to the fact that Williams was two minutes ahead of time at Yucca the plaintiff can make no complaint, since that excess caused him no hurt. Plaintiff therefore, cannot complain that the train dispatcher took no action as to that act of Williams.

What, then, is the complaint? It must be that the dispatcher ought to have anticipated that Williams, because he was two minutes ahead of time at Yucca, would be six minutes ahead at Franconia.

Defendant is not bound to anticipate negligence on the part of its employes. How, then,

can it be bound to anticipate more negligence from less? or that because an employe has exceeded his orders up to a certain point he will thereafter still further exceed them? The Circuit Court proceeded on the theory that No. 3 passed Yucca at 4:55 instead of 4:57; that this was known to the dispatcher in time to have given a stop order at Franconia; that the dispatcher was a vice-principal. And the court's conclusion was that the failure to give the order was actionable negligence toward plaintiff. The court did not state any reason for this conclusion, unless what he so found to be the facts furnish the reason.

The Circuit Court of Appeals assumed the same facts and concluded that the dispatcher was negligent because he failed to give further orders after "it became apparent that a known failure to comply with orders already made was likely to or might result in disaster." But, as we have shown, no failure known to the dispatcher did cause or have any part in causing the disaster. It was the gain made after passing Yucca that brought on the wreck, not the gain (if any) up to that point, a gain that could have been maintained with entire safety, as the facts actually existed.

If No. 3 had simply maintained its assumed lead of two minutes betwen Yucca and Franconia and so had passed No. 4 in safety at that point, the failure of the train dispatcher to stop No. 3

at Franconia and hold it to its time would not have been negligence so far as the company's employes on No. 4 were concerned, because no damage would have resulted. It could not have been made the basis of any suit for damages. It became injurious only because the engineer and conductor of No. 3, responsible agents, committed an independent, unforeseen and improbable act of negligence between Yucca and Franconia of which the train dispatcher did not or could not know until after No. 3 had passed the last named station.

Wharton, at section 145 of his volume on Negligence, says that subsequent negligence is not a bar if it was likely in the usual and natural order of things to follow from the defendant's negligence. But to bring this case within that exception it would be necessary for the court to hold that the negligence of Williams, the engineer, in disregarding his orders so as to gain four minutes in passing from Yucca to Franconia, was likely in the usual and natural order of things. But to hold that would amount to holding that the master must anticipate negligence on the part of his servant, which is contrary to a well-established rule; or, at least, it would be necessary to hold that because Williams had exceeded his orders by two minutes up to the time he passed Yucca the master should have anticipated that he

would further and to a greater degree disregard his orders after passing that station. Now, there can be no more reason for anticipating continued negligence or, rather, increasing negligence, than for anticipating negligence at all, and if the rule were to be laid down that the master must anticipate further negligence if he knows that the servant has once been negligent, the whole doctrine as to the master's liability for retaining incompetent servants would be changed. As it now stands a master is not liable as for retaining an incompetent servant merely because he knows that the servant has once been negligent. But if you say that because the servant has once been negligent the master must anticipate that he will again be negligent or be further negligent, then the master's only possible defense is to discharge a servant for the first act of negligence and never re-employ him.

It may be suggested that the train dispatcher's negligence was the last act of negligence preceding the accident. Perhaps it was so in point of time, but the sequence of events in determining the proximate cause is not determined by time. His negligence must be viewed from the standpoint of the actors. His information of the fact that the engineer had disregarded his schedule was received at about 4:58. It was received before that further act of negligence occurred

whereby the engineer gained the last four minutes in excess of his schedule time. The train dispatcher's knowledge extended only to the gain of two minutes. Therefore, from the standpoint of the persons engaged in the transaction, the train dispatcher's negligence, if any, preceded the negligence of the engineer on his way from Yucca to Franconia which brought about the accident. Really, therefore, the engineer's negligence was, speaking in a proper sense, subsequent to the negligence, if any, of the dispatcher; and really intervened between the negligence of the dispatcher and the injury.

Richmond v. Tribble's Administrator; 97 Va., 495; 24 S. E. 278.

In Union Pacific Co. v. Calaghan, 56 Fed. 988, the Circuit Court of Appeals, Eighth Circuit, Judge Sanborn, said:

> "It must also be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces. In sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause and yet subordinate to and often themselves influenced if not produced by it. Thus a defect in the construction of a boiler or an engine may long exist without harm, and yet finally be the proximate cause of an explosion to which the negligence of an engineer or climate, and many other incidental causes

nearer by years to the effect may contribute."

It is true that the question of proximate cause is often one of fact; but conceding (as we do for the purpose of this part of our argument) all the facts, with reference to the excess of speed and notice thereof, to be as claimed by the defendant in error, the question of cause is clearly one of law.

Ry. Co. v. Trich, 117 Pa. St. 300; 11 Atl. 627;

Hoag v. Ry. Co. 85 Pa. St. 293.

We apologize for so long a brief on a matter involving no question arising under the constitution or laws of the United States. We did not seek the federal jurisdiction, but being brought here we urge our rights. Nor is the case one of little importance, although it does involve none of those questions on which it is the peculiar province of this court to speak the final word. Mr. Hemenway in a recent address before the American Bar Association said: "It has been recently stated by one who has a wide experience on the bench of the Superior Court of Massachusetts that 'the provisions of the Statutes relating to the employers' liability furnish grounds for probably one quarter of the civil jury cases tried in court at the present day. This percentage is not normal.'" Am. Law Rev., Vol. 39, p. 655. It

is important that so far as possible the law be settled and that employers may know when they have performed their duty to their employes; may know at what point their legal duty ends and the execution of orders rests with those who stand as fellow-servants.

We submit that in this case there is absolutely nothing to show a breach of duty by employer to employee, and that the judgment ought to be reversed.

Dated Feb. 21, 1906.

T. J. NORTON,
E. W. CAMP,
*Attorneys for Plaintiff in Error.*

ROBERT DUNLAP,
*Of Counsel.*

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# Supreme Court

of the

# United States

OCTOBER TERM, 1905

*No. 235.*

SANTA FE PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

LAURETE HOLMES,
Defendant in Error.

## BRIEF OF DEFENDANT IN ERROR.

W. H. STILWELL,
BYRON WATERS,
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*Filed March* ..... 1906.

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# Supreme Court of the United States

OCTOBER TERM, 1905

No. 235

SANTA FE PACIFIC RAILROAD COMPANY, Plaintiff in Error.

vs.

LAURETE HOLMES, Defendant in Error.

**Error to the United States Circuit Court of Appeals for the Ninth Circuit**

## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT OF FACTS.

Defendant in error presents as his statement of facts herein, the statement of facts taken from the

brief of plaintiff in error in the Circuit Court of Appeals, and refers to the statement of facts made by the Circuit Court of Appeals in connection with its opinion herein. (Transcript of Record, p. 111):

"This is an action brought to recover damages for personal injuries sustained by defendant in error while in the employ of plaintiff in error as a locomotive engineer and by reason of a head-on collision between a limited passenger train westbound and known as Train No. 3 and a train of similar character eastbound and known as Train No. 4, and on which defendant in error was on duty as engineer, occurring at a point about one mile west of Franconia Station on the Arizona Division of the Santa Fe Pacific Railroad—a link in the transcontinenetal line of railroad known as the Santa Fe System.

"Defendant in error claims that this collision and his injuries were caused in part by negligence on the part of the train dispatcher in failing to prevent the violation of orders hereinafter mentioned, by the crew in charge of Train No. 3, by reason of which this collision resulted.

"Plaintiff in error had a train dispatching office at Needles, the jurisdiction of which included the division of its railroad extending eastward from Needles to Seligman, Arizona, known as the the "Arizona Divisica," and also the division extending westward from Needles. This office was in charge of two chief dispatchers and six assistants—three assistant dispatchers being assigned to each division, each of the assistant dispatchers being on duty and in charge of the work on his division for a period of eight hours in each day. The chief dispatcher exercised a supervisory control over the work of both divisions. Assistant

Dispatcher E. L. Moore was on duty and in charge of the work on the Arizona Division at the time of the collision in question (Transcript, pages 36 (70-1), 41 (78-9). Neither of the stations between Needles and Kingman was a regular stopping place for either of these trains (Tran. pp 25 (47), 94-½ (186), Time Table).

"All of the stations hereinafter mentioned were within the 4th district of the Arizona Division; at 4:22 on the morning of November 20, 1901, Train No. 3, westbound and about two hours late, was at Kingman, and Train No. 4, eastbound and about twenty-two minutes late, was at Needles. Both No. 3 and No. 4 were regular schedule or time card trains, and when on time or but sligthly delayed were run in accordance with the published time card and general rules, and without any special orders. On this occasion, on account of No. 3 being so greatly delayed, it became necessary to issue special orders for the operation of these trains over this division. At 3:21 on that morning, in anticipation that No. 3 would arrive at Kingman from the east greatly delayed, Dispatcher Moore promulgated a special order, No. 17, to govern the running of this train from Kingman to Needles, and this order was through the regular channels sent to Kingman and delivered to the crew of No. 3 upon her arrival at that point. But as this order was entirely superseded by later orders, it is of no moment here. (Trans. pp. 37-8 (72-4)). At 4:12 a. m., it being apparent that No. 3 would arrive at Kingman more delayed than had been expected, Dispatcher Moore promulgated a special order, No. 22 (which entirely superseded Order No. 17), the body of Order No. 22 being in words as follows:

" 'No. 3, eng. 482, has right of track over No. 4,

eng. 444 & 450 to Needles but will run 1 (one) hour & 50 mins. late Kingman to Needles.'

"Copies of this order properly and regularly addressed were through the regular channels sent to Kingman and Needles and delivered in accordance with the general rules to the crew of No. 4 before 4:22 and to the crew of No. 3 upon her arrival at Kingman at 4:21 or 22. (Trans. pp. 21-2 (40-1), 38-9 (74-5). At 4:22 No. 4 departed from Needles and ran east to Mellen, the first telegraph station, a distance of 11.9 miles, arriving there some time between 4:42 and 4:45, and stopped upon signal that there were orders to be delivered. (Trans. pp. 22 (42), 58 (115), Map of Line, Kingman to Needles).

"At 4:21, it being apparent that No. 3 was more delayed in arriving at Kingman than had been expected when Order No. 22 was issued, Dispatcher Moore promulgated a special order, No. 23 (which superseded Orders No. 17 and No. 22 except the provision in Order No. 22 that No. 3 should have the right of track over No. 4 from Kingman to Needles). The body of Order No. 23 was in words as follows:

" 'No. 3 eng. 482 will run two hours late Kingman to Needles.' (Trans. pp. 20 (39), 21 (40), 39 (75), 40 (76).

"Copies of Order No. 23 properly and regularly addressed were through the regular channels sent to Kingman and delivered in accordance with the general rules, and at the same time that Order No. 22 was delivered to the crew of No. 3 at Kingman; No. 4 having departed from Needles about time Order No. 23 was promulgated, copies of this order were sent through the regular channels to the local telegraph operator at Mellen for delivery to No. 4 upon its arrival there, and were delivered

in accordance with the general rules to the crew of No. 3 at Mellen at 4:45. These orders, considered in connection with the time card and general rules, amounted to a direction and notice that No. 3 was to be run in accordance with the time card and general rules except in this only, that it was to run two hours behind its time card time, and that for this occasion the westbound train was to have the right of track over the eastbound train (Trans. pp. 23 (43-4), 25-6 (48-9)); and in like manner amounted to a notice and direction to No. 4 to proceed toward Kingman looking out for No. 3 and running with reference to the schedule of No. 3 as provided for by the special orders in connection with the time table. These special orders, in connection with the published time table or schedule, all of which were well known and understood by each of the crews in charge of these trains, fixed and made known to each of these crews the time that No. 3 should depart from each of the stations between Kingman and Needles. (Trans. pp. 23 (44), 94-½ (186), Time Table). The testimony of numerous witnesses shows, and there is no conflict on this point, that the special orders above mentioned were proper and sufficient orders for the safe operation of these trains between Needles and Kingman, and that like orders are commonly used under similar circumstances on practically all railroads in the United States (Trans. pp. 24-5 (46-9), 31 (60-1), 40 (76), 46 (89), 47 (90), 48 (93), 53 (104). Each conductor and engineer had in his possession a copy of the oders and also copies of the time table and general rules, and fully understood the meaning and effect of the orders considered in connection with the time table and general rules. These documents fixed Franconia as the probbale place of

passing of these trains. The crew of No. 4 when they left Mellen understood that No. 3 had the right of track and they departed from Mellen with the intention of running to Franconia and there going upon the siding so as to avoid No. 3 (Trans. pp. 23 (44-5). The plan of operation of these trains under the orders in question, in respect to avoiding collision and selecting a point of passing, differed in no way from the plan of operation of trains of like class provided for by the time table and general rules in cases where the train having the inferior right of track was behind time; in such cases the train having the superior right of track, while keeping within its time, could proceed without reference to the opposing train, but the last named train was bound to look out for and avoid the train having the superior right of track.

"Train No. 3 departed from Kingman at 4:31, or in other words, six minutes late according to its schedule as provided by Special Order No. 23 and the time card. Yucca was the only night telegraph office between Kingman and Franconia, and is located 23.9 miles west of Kingman and 12.8 miles east of Franconia (Trans. p. 58-½ (115), Map). No. 3, according to Special Order No. 23 and the time card, should have passed Yucca at 4:57 (Trans. p. 94-½ (186), Time Table). Defendant in error attempted to show and the trial court found that she passed at 4:55, or two minutes ahead of her schedule time. At about 4:58 or 59 the local telegraph operator at Yucca, in accordance with the rule requiring that each local telegraph operator immediately report to the train dispatcher the time that each train passes his station, reported by telegraph to Dispatcher Moore that No. 3 passed at 4:55 (Trans. pp. 26 (50-2), 29-31 (57-61). Plaintiff in error attempted

to show that No. 3 passed Yucca on time and that the report of the local telegraph operator that she passed at 4:55 was due to an error of two minutes in the time shown by his clock, but the trial court found against plaintiff in error on this point. Train No. 4 left Mellen, the only night telegraph office between Needles and Franconia, between 4:45 and 4:47 and ran 6.8 miles to a siding or station called Powell, arriving at about 5 o'clock, and a stop of three or four minutes was there made for the purpose of adjusting the flow of fuel oil on one of her locomotives (Trans. pp. 23 (44-5), 25 (47-8). No. 4 then proceeded toward Franconia, and while running between forty and fifty miles per hour collided with No. 3, which was running between sixty and seventy miles per hour, at 5:12 or 13, and at a point about one mile west of Franconia. No. 3 had passed Franconia station at 5:11, or six minutes ahead of the time fixed by Special Order No. 23 and the time table (Trans. p. 32 (63).

"But for the collision No. 4 would probably have had time to reach Franconia and to have gone upon the siding there before 5:17, the time fixed for No. 3 to pass Franconia. Both these trains were wrecked, a number of persons killed, and several others, including plaintiff, sustained serious injuries in this collision.

"Defendant in error alleged that the collision and his injuries were caused 'solely by reason of negligence and want of care on the part of defendant.' Trans. pp. 4 (6-8). Plaintiff in error denied this allegation and affirmatively alleged: First, that the collision and defendant in error's injuries were caused by his contributory negligence; and, second, that the collision and defendant in error's injuries were caused by his negli-

gence and carelessness and the negligence and carelessness of his fellow-servants and co-employes (Trans. pp. 10-11 (19-21)."

The assignments of error presented for consideration but three questions:

First: As to the jurisdiction of the trial court.

Second: Are the findings of fact sufficient to support the conclusions of law and the judgment?

Third: Is there any evidence to support the findings of fact?

These questions will be considered in the inverse order named.

## IS THERE ANY EVIDENCE TO SUPPORT THE FINDINGS OF FACT?

Assignment No. 7 (Record p. 118) notices the latter part of finding 3, wherein it was found that the accident and collision in question in this case "was caused wholly by negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of a fellow servant, or fellow servants, that negligence of each said defendant through its train dispatcher, and fellow servant, or fellow servants, approximately contributing to the aforesaid collision, injuries and damage." (Record p. 14).

Finding IV. is as follows:

"That defendant's train dispatcher, when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care care and precaution to prevent said engines and trains from colliding; and in failing to use ordinary care nad prudence by not giving proper orders as to the movement of one of said engines and train." (Record p. 14).

The statement of facts gives in detail the facts concerning the handling of the two trains over the track covered by the train dispatcher's sheet to the place of collision, and we may assume that this narration of facts is as favorable to plaintiff in error as the record will warrant, yet it discloses a series of facts in evidence upon which a trial court could properly deduce all the findings of fact found by the trial court in this case, but in the record there is more and stronger evidence in support of the findings of negligence on the part of plaintiff in error than is set out in such statement of facts.

The case was tried by the court sitting without a jury (Stipulation, Record, bottom p. 12).

Under the provisions of Sec. 649 and 700 U. S. R. S. such finding of fact is conclusive upon this writ of error if there was any evidence upon which such finding could be made.

In the case of Dooley vs. Pease, 180 U. S. 126, the rule is stated thus:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Stanley vs. Albany Co. Supers. 121 U. S. 547.

"Errors alleged in the findings of the court are not subject to revision of the circuit court of appeals or by this court, if there was *any evidence* upon which such finding could be made."

Hathaway vs. First Nat. Bank, 134 U. S. 498.
St. Louis vs. Rutz, 138 U. S. 241.

The negligence of plaintiff in error arose out of the failure of Train Dispatcher Moore to avail himself of knowledge of facts brought to his notice in the line of his duty that a collision between trains 3 and 4 was imminent and that he did not give such orders which he well could have done as to the management and running of said trains, by which such collision would have been prevented.

His Honor, Judge Wellborn, in his conclusions (Record p. 18 (34), stated the facts showing such negligence as follows:

"Second—Train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and, in failing to so act, was negligent.

"Without undertaking to review the evidence, it may be well to observe here, that in my opinion, the statement of Moore to the operator at Yucca, that the latter's clock was two minutes slow, and placing the figure 7 over the figure 5 on the train sheet, was subsequent to the collision, and but clumsy shifts of Moore, under great mental perturbation, to obliterate what seemed to him and in fact were unmistakable traces of the fatal negligence of which he was consciously guilty.

"Third—Said negligence of the train dispatcher, together with that of the conductor and engineer of train number 3 in running said train ahead of its time, caused said collision, and, therefore defendant is responsible for plaintiff's injuries.

"While there is some conflict of opinion among the witnesses as to the time necessary to start a

train, such as No. 4, from Powell, and clear an opposing train at Franconia, it appears, if not incontestibly, certainly by a decided preponderance of evidence that the collision occurred one mile west from the west switch of the Franconia siding, and five minutes before train number 3 was due at Franconia station, 1250 east of said switch, and, that plaintiff, but for said collision, could have reached and placed his train, number 4, on said siding within two or three minutes thereafter, and this would have been two or three minutes before number 3 was due at said station, while defendant's rule No. 385 only requires the train not having right of track to take siding and be clear of main track before leaving time of opposing train."

The train sheet made up by Train Dispatcher Moore as these two colliding trains approached each other, station by station, upon which sheet was kept or should have been kept, a record of the progress by hour and minute, is a writing which plaintiff in error made at the time as each act was done and as each fact occurred. It is the one piece of documentary evidence in the case, which records the events as they happened, and shows upon its face in most unmistakable terms that plaintiff in error had notice just after train number 3 had passed Yucca station that train number 3 was running ahead of its time by two minutes as it passed that station.

This train sheet is to be found copied into the record at page 98-½ (195). The original should be lodged with the clerk of this court for inspection.

The effect of the knowledge of the train dispatcher is shown by the train sheet that train number 3 passed Yucca station at 4:55 a. m., and

so ahead of its schedule time, was to apprise the plaintiff in error that such train was violating its rule 392, provided for the safety of its trains, requiring that "a train must not arrive at a station in advance of its schedule arriving time, when shown."

"A train must not leave a station in advance of its schedule leaving time."

Rule 392 (Record p. 82 (162).

Having this knowledge that train number 3 was running in advance of its schedule time, on a down grade, where more time could be gained by its attaining greater speed, the train dispatcher was thereby placed on notice that either the train crew was wilfully violating rules and orders, or that the train was from some cause uncontrolable, or that the engineer's watch was stopped or running slow, and under the circumstances it was but the exercise of common sense and common prudence for the train dispatcher to make an order to the operator at the next station, Franconia, to stop number 3, as it was evident to him, or should have been from the orders in force to number 4, that that train had not yet but soon would arrive at Franconia, and that unless number 3 were stopped at that point, there would be a collision.

That train dispatcher had from 4:58 or 4:59 to 5:11 within which to make this order and stop number 3 at Franconia.

No such order was given, and number 3 passed Franconia at 5:11 a. m., running by at 45 to 50 miles per hour, and within two minutes thereafter, running at a speed of 60 to 70 miles an hour, came in collision with number 4, going at a speed of 45 miles per hour, the combined momentum of

the two objects being at the rate of 105 to 115 miles per hour.

The deposition of Dispatcher Moore was taken on interrogatories (Record 27 (51-52), 29-30 (57-60). Its importance suggests its reproduction here:

"My name is Edward L. Moore. On November 20th, 1901, my occupation was train dispatcher. On the morning of that day I was working as train dispatcher at Needles, California, for the Santa Fe Pacific Railroad Company."

"Q. Did the operator at Yucca, Arizona, telegraph you anything as to the passage of train number 3 through Yucca on that morning?

"A. Yes, he did.

"Q. What was it that he telegraphed you, and at what time did you receive the telegram or telegrams?

"A. I received the message at about 4:58 a. m., that train No. 3 had passed there at 4:55 a. m. This is my recollection in the matter.

"Q. Did you or did you not make the figure 4:55 opposite the word Yucca on the train sheet you were using that morning?

"A. I did.

"Q. If you did not, state who did if you know.

"A. I did it myself.

"Q. At what time were the figures 4:55 placed opposite the word Yucca written on that train sheet, and why?

"A. They were placed there about 4:58 or 4:59 a. m. on November 20th, 1901, and I placed them there because the operator at Yucca reported the train by there at 4:55.

"Q. State whether or not you ever wrote the figure '7' opposite the word Yucca on the train sheet.

"A. I did write it.

"Q. Do you know who did?

"A. I did it myself.

Repeated in answer to interrogatory No. 12.

"Q. Do you know when the figure '7' was placed in the column devoted train number 3 on the train sheet of defendant on the morning of November 20th, 1901?

"A. As near as I can remember it was between 4:58 and 4:59 on that morning.

"Q. State when it was.

"A. I have answered this in preceding answer, and will say that so far as I can remember it was *a few seconds after the accident occurred.*

"Q. State circumstantially and in detail all you know regarding the writing of the figures 4:55 and 4:57 in the column devoted to train number 3, opposite the word Yucca on that train sheet of defendant company on November 20th, 1901.

"A. I have stated that I placed those figures there myself, and I wrote them. I wrote the 4:55 just before the accident, and I placed a 7 over the second five just after."

(The witness here also testified that the system of dispatching on the road was that used on all best roads.)

"Q. Why does the said train sheet fail to show the time that train number 3 passed through Franconia on that morning?

"A. During the conversation which I had with the operator at Franconia the collision occurred, and on account of the excitement I failed to place the time on the sheet." (Record p. 31 (60.)

This is all the testimony of Moore touching the facts herein involved.

It is observable that Moore does not in any way excuse the writing of the figure 7 over the figure 5

and especially that he does not say that it was so done because any clock was two minutes slow.

Although he was cross examined on behalf of plaintiff inerror, he was not asked under oath as to the fact of the clock at Yucca being slow, notwithstanding two company employees "said" they had heard him "say" so.

It is not considered necessary that the evidence should be pointed out which shows the functions of the train dispatcher, and his train sheet, nor their importance, as those matters have become common knowledge, and that the train sheet is the instrument, and the only instrument, used by the train dispatcher on duty to keep track of the whereabouts of each and every train on his division, that he could not handle the trains without such an instrument, that the train dispatcher has absolute control of all trains on his division during all the time they are thereon, his duty being to receive from each station operator the notice of the leaving of each train as it passes and to at once record this on the train sheet, at the same time look over said train sheet, see the whereabouts of slower or opposing trains and issue such orders as will prevent head-on or tail-end collisions. The record is replete with evidence as to the duties and functions of train dispatchers.

See testimony of Laurete Holmes, Record p. 36 (70).

See testimony of John Denair, Record p. 28 (53-4).

See testimony of J. E. Butler, Record p. 41-47 (78-91).

We call attention to the fact that on this train sheet the train dispatcher has marked 5:45 and

5:47 against the word "Mellen" instead of the figures 4:45 and 4:47 (Record 98-½ (195), the actual time of arrival and departure of train number 4 from said station. This fact of negligence could easily have caused him to fail in giving the operator at Franconia the necessary order—as when he was notified that train number 3 passed Yucca two minutes ahead of time and then consulted his train sheet it showed that there was nothing in the way of train number 3 instead of showing the exact situation.

The important and fatal omission of the train dispatcher just prior to the collision is apparent from perusal of rule 471 (Record p. 88 (173):

"Meeting orders must not be sent for delivery for trains at the meeting points if it can be avoided. When it cannot be avoided special precautions must be taken by the train dispatcher and operators to insure safety. There should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders."

For forms of such orders see Record p. 89 (176).

The making of a special order fixing a meeting point for trains 3 and 4 was called for by existing circumstances.

Both trains being behind their regular schedule time, one by two hours, and the other by twenty minutes, and their schedule meeting point being annulled, the distance between the two trains being up grade for number 4 and down grade for number 3, thus rendering their speed unknown, the fact that there was no telegraph station between Mellen and Franconia, at which stations only orders could reach number 4, and the fact that after leaving Kingman, number 3 could only be reached by telegraphic orders at Yucca and Franconia. (See Time Table, Record 94-½ (186).

While this situation at the starting of the two trains called for the making of a meeting point for them by order, and it was negligence under the circumstances not to make one, yet, when for some cause number 3 left Yucca station ahead of time and the dispatcher was notified of the fact, the duty to then issue an order to train number 3 to meet number 4 at Franconia became apparent, urgent and imperative.

There appears to have been something, not shown of record, by which Engineer Williams understood that while he was running ahead of time and had the right of way and no notice of a meeting station, he should continue, possibly, and make up as much time as possible unless he received orders to the contrary from the train dispatcher, who was, or should have been, conversant, as this engineer was not, with the whereabouts of the other train and the rate of speed being made by it.

Even under the rule last quoted it appeared not to have been given to the engineer of number 3 to know anything about the point of meeting of train number 4 or the certain effect of passing Franconia station a few minutes ahead of new schedule time.

Otherwise it would have been impossible for the catastrophe to have happened. This view is supported by the record.

When Engineer Williams, on engine pulling number 3 approached Franconia six minutes ahead of his special order time for leaving that station, he whistled his signal to inquire if there were any orders for his train at that station, and received the truthful reply, "no orders from train dispatcher" by semaphore signal from the operator, and pulled away on his right of track given by special order, doubtless in fancied safety, re-

lying upon the train dispatcher to keep moving trains off the main line ahead, and attaining a speed of a mile or more a minute, came, within 1¼ miles, in collision with number 4, and "both trains were wrecked, a number of persons killed, and several others, including plaintiff, sustained serious injuries." (Quotation, from brief of plaintiff in error, Circuit Court of Appeals, p. 6, Statement of facts ante p 7).

Operator Smith of Franconia says:

"I did not have any orders for number 3 or number 4 that morning."

Record, p. 36 (64).

The conclusion is irresistible that engineer Williams, notwithstanding his testimony, must have been aware of what he was doing—endeavoring to run ahead of the schedule time for the purpose of making up lost time, that he had the right of way in the absence of receiving a signal or orders to the contrary, and having received no notice whatever of a meeting station, he must have been under the impression that his acts were receiving the approval of the train dispatcher, whose duty and ability it was to have accurate knowledge of the movement of the trains number 3 and 4 and to select a meeting station for them. Yet Engineer Williams testified that he was running on special schedule and was not ahead of time, but the accident that happened at least a mile west of Franconia, disclosed that he had what might be termed an "excess" or "rebate" of time of five or six minutes.

Even the operator at Franconia does not appear to have had any knowledge that Franconia was the meeting point. The printed rules and

regulations appeared to have been wholly suspended and everything appears to have been entrusted to the train dispatcher to an extent justifying a belief that the printed rules and regulations, under the existing circumstances, shown in this case, are not so generally relied upon by the company to avoid accidents as to avoid its liability from accidents.

Under these circumstances, the learned and conservative court of appeals, referring to the question as to whether the evidence sustained the findings of fact of the trial court, held, "we cannot say on examining the evidence in the bill of exceptions that there was no evidence of negligence on the part of th plaintiff in error."

Further than this the appellate court would not consider the evidence.

Abbotsford, 98 U. S. 440-443.
Jennings vs. Leonard, 21 Wall. 302.
Raimond vs. Terrebonne Parish, 132 U. S. 192.

II.

DO THE FINDINGS OF FACT SUSTAIN THE JUDGMENT?

WAS IT ERROR TO HOLD THE PLAINTIFF IN EROOR ACCOUNTABLE FOR THE NEGLIGENCE OF ITS TRAIN DISPATCHER?

See opinion Circuit Court of Appeals, Record p. 114, citing

Northern Pac. Ry. Co. vs. Dixon, 194 U. S. 338.

Oregon Short Line vs. Frost, 21 C. C. A. (74 Fed. R. 965).

In Northern Pac. Ry. Co. vs. Mix, 57 C. C. A., 592, the Circuit Court of Appeals approved the instructions as follows, given by the trial court:

"It is the duty of defendant company to all opperators on its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction and to give such orders as will insure the safe passage of the one by the other. With regard to the movement of trains, the train dispatcher stands in the place of the defendant."

DUTY OF THE MASTER

must be commensurate with the character of the service required and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case."

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Hanley vs. Cal., etc., Cal. 240.

"The diligence required will be the greater as the danger in hazards increase."

Darrigan vs. N. Y. E. R. Co., 2 Neg. cases, 264. 52 Conn. 285.
52 Am. Rep. 596.

"The greater the danger to be apprehended, the greater should be the care exercised."

Northern Pac. Co. vs. Mix, 121 Fed. 481.
Mercantile Trust Co. vs. Pittsburg & W. Ry. Co., 115 Fed. 481.

"To make such provisions for the employees as will reasonably protect them against the dangers incident to their employment."

Daves vs. Southern Pac. Co., 98 Cal. 24.
Elledge vs. Ry. Co., 100 Cal. 290.
Nixon vs. Selby Smelting Co., 102 Cal. 464.
See Union Pac. Ry. Co. vs. Jaroi, 53 Fed. 67.
Hanley vs. Cal., etc., Co., 127 Cal. 240.
2 Am. Neg. cases, 264.

CONCURRENT NEGLIGENCE.

Grand Trunk Ry. vs. Oliver P. Cummings, 106 U. S., 700.

The court, by Chief Justice Waite, said:

"At the close of the case on both sides, the court gave to the jury sundry instructions not excepted to, and then at the request of Cummings instructed them further, 'that if Noyes (the person claimed to be a co-servant) was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes, of itself, does not exonerate them if one of their own faults contributes.' In the instruction which was given we find no error. It was in effect that if the negligence of the com-

pany contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty or wrong."

See New Jersey & N. Y. R. Co. vs. Young, 49 Fed. 725.
Northern Pac. R. Co. vs. Poirer, 67 Fed. 885.
Crew vs. St. Louis K. & N. W. Ry. Co., 20 Fed. 92.

## III.

## HAD THE TRIAL COURT JURISDICTION?

The claim of plaintiff in error is not that the action was not properly brought but that the allegation in the complaint is technically defective. There is no pretense or claim that plaintiff in error is not a corporation created by and exercising powers not only as alleged in the complaint, but also and as fully and in all respects as plaintiff in error claims the complaint should have alleged. In other words, the assigned error is in effect, that the complaint does not set forth the corporate powers and its creation as fully and completely as might have been done, or in the language suggested by the plaintiff in error. (Record p. 4, subdivision II. Complaint).

See Opinion Circuit Court of Appeals (Record, p. 115).

The averment is admitted by plaintiff in error to be true by a failure to deny the same in its answer.

See Answer, Record, p. 11 (20).

In addition to this averment and admission, the fact that plaintiff is a federal corporation is made manifest by three several acts of Congress, out of which plaintiff in error derives its existence.

On July 27, 1866, an Act of Congress was passed, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast," under which act of Congress the Atlantic and Pacific R. R. Co. was incorporated.

U. S. Stat. at L. Vol. 14, p. 292.

On March 3, 1897, an Act of Congress was passed (See Stat. at L., Vol. 29, p. 622), entitled "An Act to Define the Rights of Purchasers under Mortgages Authorized by an Act of Congress, April 20, 1871, Concerning the Atlantic and Pacific R. R. Co.," under the provisions of which the purchasers at any such sale or sales and their associates and assigns shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises on said property and to exercise the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation granted by the Act of Congress, approved July 27, 1866, incorporating the Atlantic & Pacific R. R. Co., and under and by virtue of this Act, the Santa Fe Pacific Railroad

Co., being the purchaser at such sale, was incorporated.

Such formation of the corporation of plaintiff in error, Santa Fe Pacific Railroad Co., was thereafter and by Act of Congress, June 27, 1902 (Stat. at L., Vol. 32, p. 405), recognized by Congress in its authorizing said company to again transfer its assets to the Atchison, Topeka & Santa Fe Company.

Bythese acts of Congress and by them alone was created the corporation, the Santa Fe Pacific Railroad Company, plaintiff in error herein.

With respect to this question of jurisdiction, the decisions of the Supreme Court of the United States have for nearly a century uniformly been to the effect of sustaining the jurisdiction of the Federal Courts in such cases as this.

In Union Pac. R. R. Co. vs. Myers, 115 U. S. 1-25.
Osborn vs. Bank of U. S., 9 Wheat. 817-828.
See "Pacific Railroad Removal Cases," 115 U. S. 1-3.

Later, in the case of Texas Pac. R. Co. vs. Cody (166 U. S., 608-611), the Supreme Court of the United States again reiterates the same doctrine, and in doing so distinguished the case of Oregon S. L. & U. N. R. Co. vs. Skottowe (162 U. S., 490), relied upon by plaintiff in error in the case at bar in the lower court:

"By the Acts of Congress of 1887 and 1888 the jurisdiction of the circuit court on removal by defendant (and defendants alone can remove) is limited to such suits *as might have been originally brought in that court;* and it is essential if the jurisdiction is invoked on the ground that the

cause of action arises under the Constitution, laws or treaties of the United States that this should be asserted. If recovery directly depends upon a right claimed under the Constitution, laws or treaties, plaintiff's statement of his case must necessarily disclose the fact, and if the action is brought in that state court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant put his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the state to test the Federal questions thus raised.

"It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he cannot cut off defendant's constitutional right as a citizen of a different state than the plaintiff to choose a federal forum, by omitting to aver, or mistakenly or falsely stating, the citizenship of the parties.

"And this must be also as to Federal railroad corporations. It was held in Union P. R. Co. vs. Myers ('Pacific R. Removal Cases'), 115 U. S. 1, that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and, therefore, suits by and against them were 'suits arising under the laws of the United States.' Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them.

(610) "*If in this case plaintiff had simply described defendant by its name, without more, there would seem to be no question that, as the corporation was judicially known to be a federal corpor-*

*ation* (Italics ours), defendant would be entitled to remove the case on proper allegations in its petition; and we think this necessarily follows, where, by some mistake, or otherwise, the defendant is erroneously stated to be created under state laws. Here defendant was described as 'a private corporation, created and existing under the laws of the state of Texas,' and this was repeated in an amended petition, filed in the circuit court; but no motion to remand was made, nor was the propriety of the removal questioned in any way. Possibly the pleader did not intend to deny the Federal character of the company, but whether so or not, no issue was or could be made as to the source of its corporate existence.

"Oregon S. L. & U. N. R. Co. vs. Skottowe, 162 U. S., 490, is in harmony with these views. That was an action brought in a court of that state of Oregon, to recover for personal injuries alleged to have been caused, in Oregon, by the negligence of the defendant company. A petition for removal was filed and denied, and this denial was approved by the Supreme Court of Oregon. Defendant was described in the complaint as 'a corporation duly organized, existing and doing business in the state of Oregon.' In the removal petition the defendant was alleged to be a consolidated company, composed of several railway corporations severally organized and created under the laws of the territories of Utah and Wyoming and of the state of Nevada, and under an act of Congress, approved August 2, 1882 (22 Stat. at L. 185, chap. 372), entitled 'An Act Creating the Oregon Short Line Railway Company, a corporation in the territories of Utah, Idaho and Wyoming, and for Other Purposes'; and an act of Congress, approved June 20, 1878 (20 Stat. at L. 241, chap. 352), making the

Utah and Northern Railway Company a railway corporation in the territories of Utah, Idaho and Montana.

"This court held that, so far as appeared, *the defendant company existed and was doing business in the state of Oregon solely under the authority of that state*, whether express or permissive; that the acts of Congress referred (611) to did not disclose any intention on the part of Congress to confer or right to be exercised outside of the territories named therein, and that the Supreme Court of Oregon committed no error in affirming the action of the trial court denying the petition for removal.' * * *

"We are of the opinion that the circuit court properly entertained jurisdiction."

In this case it affirmatively appears that plaintiff in error exists and is doing business solely under the authority of acts of Congress, and hence the Skottowe case affords no support to plaintiff in error in its claim of want of jurisdiction, but on the contrary, supports federal jurisdiction in this case.

Regarding assignments of error, defendant fails to find in the record, the holdings, or decisions, by the court, set forth and specified by plaintiff in error's assignments of error, numbers II, III, IV, V, VIII a, and VIII b, IX and X (Record 117, 118 and 119), and contends that such assignments of errors are not in form required by rules 21 and 35 of this court, for the reason that an assignment of error must refer to a particular ruling or decision, and not to a possible reason for a ruling or decision of the lower court. The court can only err by acting, or failing to act.

We have discussed the questions of the sufficiency of evidence to support the findings, the suf-

ficiency of the findings to support the judgment, and the question of jurisdiction, as the only questions presented in the record.

The judgments of the lower courts, respectively, should be in all respects affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

# Supreme Court of the United States.

No. 235.—October Term, 1905.

Santa Fe Pacific Railroad Company, Plaintiff in Error, vs. Laurete Holmes. | In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 21, 1906.]

Action brought in the Circuit Court of the United States for the Ninth Circuit, Southern District of California, by defendant in error, for damages for injuries received by him in a headon collision of two trains, on one of which he was an engineer. The answer alleged negligence upon the part of defendant in error, by disobeying the orders, rules and regulations of the company, and also alleged that the collision was caused by the negligence of a fellow servant. The action was tried without a jury, and the Circuit Court found for defendant in error in the amount of $9,000, and entered judgment against the company for that sum. The judgment was affirmed by the Circuit Court of Appeals. (136 Fed. Rep. 66.) The company, being a Federal corporation, then sued out this writ of error.

The colliding trains were regular passenger trains, and are denominated in the testimony as train No. 3 and train No. 4, the former being westbound and the latter eastbound. Defendant in error was the engineer on No. 4, or rather one of the engineers, the train being hauled by two engines. He was the engineer of the second engine. Both trains were run on regular schedule or time cards when on time or slightly delayed, No. 4 having the right of track. On the morning of the collision, November 20, 1901, train No. 3 was unusually delayed, and special orders became necessary for the operation of the trains on the Arizona division. The first order was issued before train No. 4 had left Needles. The order was as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 and 452 to Needles, but will run 1 hour 50 minutes late Kingman to Needles." The copy of the order was delivered to train No. 4 before 4.22 A. M., before its departure from Needles, and to No. 3 upon its arrival at Kingman at 4.21 or 4.22 A. M. Train No. 4 ran east to Mellen, a distance of 11.9 miles, where it stopped upon signal. In the meantime the second order (No. 23) was issued by the train dispatcher, train No. 3 having been more delayed in arriving at Kingman than had been expected. This order was delivered to train No. 4 at Mellen. It read as follows: "No. 3 eng. 482

will run two (2) hours late Kingman to Needles." A copy of the order was delivered to No. 3 at Kingman. The effect of these orders and the general rules of the company was that No. 3 was to run according to the time card, except that it was to run two hours late and was to have the right of track over No. 4, the latter to look out for No. 3, and run with reference to its movement as provided for by the special orders in connection with the timetable. The orders and the timetable would have made Franconia the proper place of passing of the trains, No. 3 being due to arrive there at 5.17, No. 4 at 5.06, or eleven minutes ahead of No. 3. Train No. 3 should have left Kingman at 4.25. It left at 4.31, six minutes late. It passed Yucca, however, at 4.55, (this is disputed, but upon what evidence we shall presently consider), it should not have passed until 4.57; and it passed Franconia six minutes ahead of time. The operator at Yucca (the only night telegraph office between Kingman and Franconia) at 4.58 or 59 reported to the train dispatcher that No. 3 had passed at 4.55.

No. 4 left Mellen, which was the only night office between Needles and Franconia, between 4.45 and 4.47, and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop was made of three or four minutes for the purpose of adjusting the flow of oil in the leading locomotive, and then proceeded towards Franconia. In the meantime No. 3 had arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. On approaching the station the engineer signalled an inquiry for orders and received by semaphore signal from the operator the reply: "No orders from the train dispatcher." He did not stop at Franconia, and while the train was going at a speed of from sixty to seventy miles an hour, about one and one-quarter miles from Franconia it collided with No. 4, which was running from forty to fifty miles an hour. Both trains were wrecked, the engineer of the leading locomotive of No. 4 and several others were killed, and the defendant in error sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. But for the collision No. 4 would have reached and have been placed on the siding at Franconia, notwithstanding the delay at Powell, two or three minutes before No. 3 was due at Franconia. Plaintiff in error's rule No. 385 only requires the train not having the right of track to take a siding and be clear of the main track before the leaving time of the opposing train. Other facts are stated in the opinion.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The case here is in narrow compass both as to the facts and the law. It is apparent that none of the operators of train No. 4 was guilty of negligence. The second special order indicated Franconia as the meeting point

of the trains and that train No. 4 should reach there before 5.17, the leaving time for train No. 3. This it could have accomplished notwithstanding the delay at Powell. It is equally apparent that train No. 3 was ahead of time and we may consider that its engineer was culpable. The question is yet presented whether the company is not charged with liability. In this question there are involved two elements, one of law and one of fact. It is not denied that the train dispatcher represented the company in the promulgation of the special orders. It is, however, asserted that this representation ceased by the promulgation of the orders and that he was not required to repeat them or promulgate new ones. "There is no ground," it is insisted, "either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them." There is an instant answer to the contention. Instead of according with principle and authority it is opposed to both. It contradicts a concession elsewhere made in the argument, that it is the duty of a railroad company to promulgate adequate rules and regulations for the safety of employes engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it. It may indeed often be discharged by one exercise. It may recur at any moment in keeping moving and opposing trains in safe relation. The rules of the company recognize this. They require telegraph operators to report the time of departure and passing of trains. This is absolutely necessary for supervision. The business is hazardous. Trains may be rushing towards each other upon a single track. All may go well. The observance of time alone may be sufficient for safety. But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train dispatcher know it and not guard against it? A negative answer would be revolting.

There can be no doubt of the duty of the train dispatcher in such case. His duty is clear if the circumstances call for action. Did the circumstances in the case at bar call for action? In answering this it will do no good to discuss cases. The principles of law are clear. A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty. Or to put the matter more guardedly, there is no circumstance in this case which exempted from that duty. The special orders were an assurance of the company, through its train dispatcher, to train No. 4, that it could run with safety between Mellen and Franconia if it arrived at the latter station before 5.17. If anything occurred to change that condition

which came to the knowledge of the company train No. 4 was entitled to know it, and we are brought to the simple question, did anything occur? It is admitted all around that train No. 3 did not comply with orders and arrived and departed from Franconia ahead of time. It is disputed whether it arrived at or departed from Yucca ahead of time. Both of the lower courts found that it did, and we cannot say that the evidence does not sustain the finding. The telegraph operator at Yucca notified the train dispatcher that the train passed two minutes ahead of time—passed at 4.55; its time was 4.57; and we know that it passed Franconia six minutes ahead of time, a circumstance which tends to show that the operator at Yucca was right. That there was an erro. in the operator's clock was an afterthought of the train dispatcher. He received and recorded on the "train sheet" the time (4.55) which was given him. He testified (his deposition was taken by defendant in error) that he received the report of the operator at 4.58, and that he made the entry at 4.55, "just before the accident, and placed '7' over the second '5' just after the accident." He was asked no further explanation by either of the parties. The operator (who was also called by defendant in error) testified that shortly after he had reported the passing of train No. 3 he was called up by the train dispatcher, who asked: "What time have you got?" The operator gave the time 4.51 or 2, and the dispatcher replied: "Your clock is two minutes slow," or such a matter. And this testimony has corroboration in the testimony of the operator at Kingman, who heard the conversation. It appears, therefore, that the attention of the train dispatcher was challenged to the fact and felt the importance of the fact that train No. 3 was running contrary to orders. What should he have done considering that two trains were rushing toward each other upon a single track, the safety of both dependent upon the exact observance of time by both? Minutes were important, and how important the testimony exhibits everywhere. The clocks of the telegraph operators are adjusted by standard, and not allowed to vary three seconds. The practice and safety of special orders are recognized as dependent upon the exact observance of time. Their superiority to meeting points for trains is attempted to be demonstrated by witness by saying that "it is one of the objects of good railroading to cover the greatest distance in the least time, and to keep in motion the largest number of trains on a division." The object was beset with dangers and demanded a proportionate care. It allowed little margin for inevitable delays. There was no place in it for any negligence. A train was in fault if it was behind time. It was the height of culpability to be ahead of time. A close connection at "clearance" points was expected. It was testified that trains of the first class, which No. 3 and No. 4 were, "can clear each other to a second." If the trains are of different classes the inferior must clear by at least five minutes.

Such was the system and what it demanded the train dispatcher must have known. In such a system minutes—and even seconds—are important, and it was the duty of the train dispatcher to regard them. He knew, to use the testimony of the company's chief dispatcher, that it was the duty of train No. 3 "not to run less than two hours late with reference to her schedule, as prescribed in the regular timetable." She was not allowed, was his emphatic declaration, "to make up one second of that two hours as long as that order was in effect." She (to keep up the personification of the witness) was running two minutes ahead of time. This might of itself have caused a collision. The other train was to be considered, and that minutes were important should not have been out of the train dispatcher's mind an instant. He knew that No. 3 had the right of way with no obligation to No. 4 but to observe time. He knew that No. 4 was "to get into the clear and out of No. 3's way," and had no other guide but the time prescribed.

These comments do not lose their force or application by reason of the fact that under the special orders the trains had an allowance of eleven minutes at Franconia. This allowance was made upon the basis of a strict observance of time, the perfect working of machinery and exact accordance of clocks. But such perfection in the nature of things was liable to disturbance, and when disturbance was observed should have been provided against, and immediately provided against. It was no time to take chances or debate probabilities. It is to be remembered that at all stations there were not night telegraph offices. Yucca was the only one between Yucca and Franconia, and between those stations the train was lost to observation and control. The train dispatcher indeed exhibited his concern. All of the fatal significance of train No. 3 running ahead of time came to his mind. His mistake was to account for it by an error in the telegraph operator's clock, (giving to him this excuse against the finding of the lower courts,) although he knew that the clock must have been adjusted that day under the rules with the standard time. If we were forced to find the fact we should find it against him, but it is enough to say that there was brought to him, considering his position and the responsibilities upon him, a demand for a care which he omitted to observe. If he had been as considerate as he ought to have been he would have stopped No. 3 at Franconia. And for this conclusion we need not the proof afforded by the collision. The collision, however, and the excuses offered for it, make the conclusion irresistible. Plaintiff in error excuses the train dispatcher by a defect in the clock of the telegraph operator at Yucca. The engineer of No. 3 excuses himself by virtually condemning the clocks of the company by which he had tested his watch. He is sure if No. 4 had been running on time he would have met her at Haviland, the station between Yucca and Franconia.

A system which permits such confusion and the endangering of human lives is wrong or wrongly administered. We need go no farther in the present case than to say that it was wrongly administered. The train dispatcher failed to take into account and do what a prudent man would have taken into account and have done.

*Judgment affirmed.*

Mr. Justice BREWER dissents.

True copy.

Test:

*Clerk Supreme Court, U. S.*